TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 137.

DAVID LUPTON'S SONS COMPANY, PLAINTIFF IN ERROR,

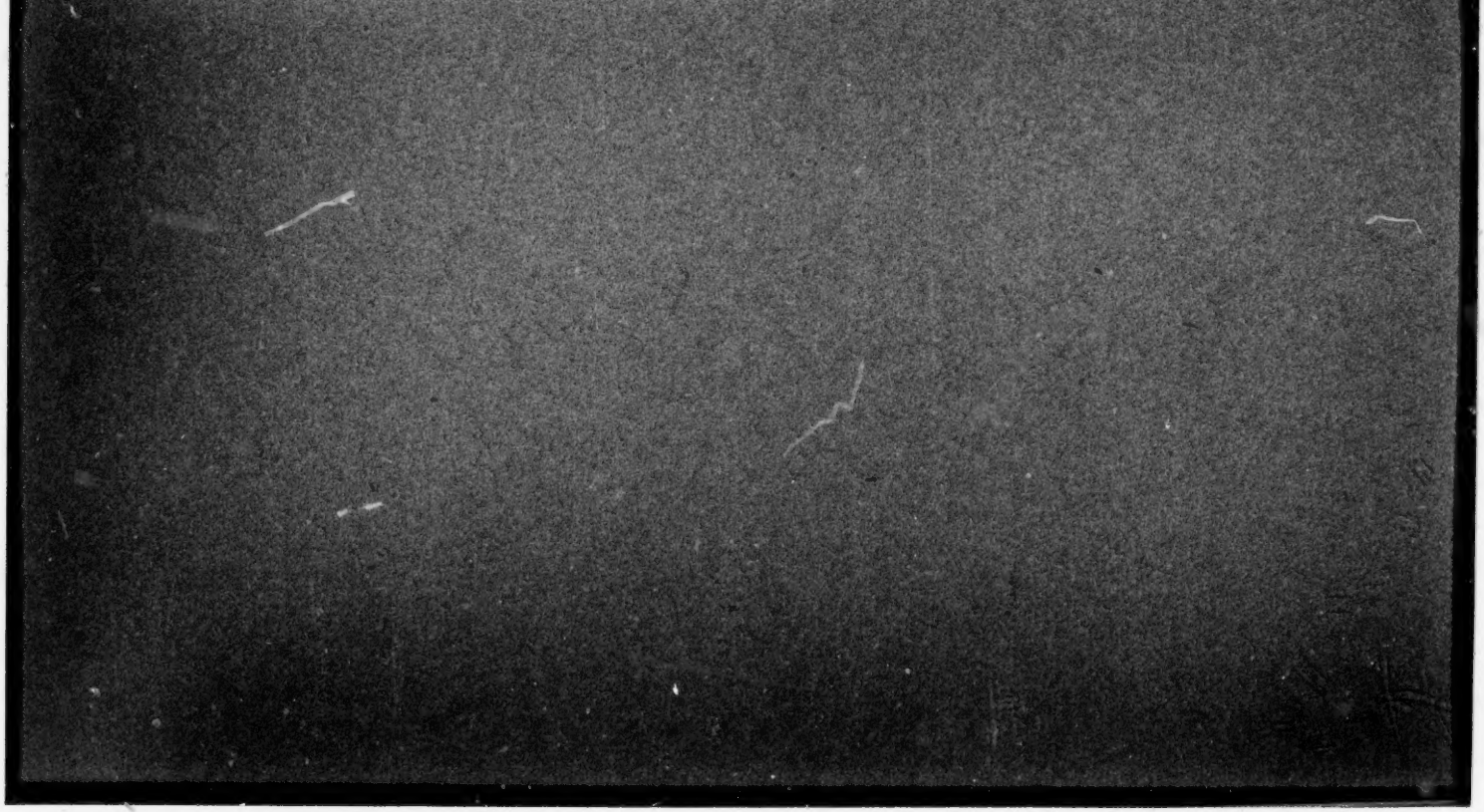
vs.

THE AUTOMOBILE CLUB OF AMERICA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 27, 1909.

(21,840.)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1911.

1 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Petition for Writ of Error.

To the Judges of the Circuit Court:

And now comes the David Lupton's Sons Company, the plaintiff herein, and says that on or about the 11th day of August, 1909, this Court entered judgment herein on favor of the defendant and against the plaintiff, dismissing the complaint herein with $733.50 costs, in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of the plaintiff, all of which will appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue out of the Supreme Court for the correction of the said errors.

SCOTT, UPSON & NEWCOMB,
Attorneys for Plaintiff.

27 William Street, Manhattan Boro-, New York City.

The above petition and the writ of error prayed for are allowed, and a bond in the sum of $1500. being presented, the same is hereby approved as a supersedeas bond.

Dated, New York, August 19, 1909.

H. G. WARD,
U. S. Circuit Judge.

(Endorsed:) Due service of a copy of within petition and Order is admitted this 20th day of August, 1909. Niles & Johnson, Attorneys for Defendant in Error.—U. S. Circuit Court, Southern District N. Y., Filed Aug. 23, 1909, John A. Shields, Clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between David Lupton's Sons Company, plaintiff, and The Automobile Club of America, defendant, a manifest error hath happened, to the great damage of the said plaintiff, David Lupton's Sons Company, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 16th day of September, 1909, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of August in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
H. G. WARD, *U. S. C. J.*

3 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the pages numbered from one to 112 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of David Lupton's Sons Company, Plaintiff in Error, against The Automobile Club of America, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the second Circuit, this 24th day of September, in the year of our Lord, one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] Law. 1/168. E. & A. 2968. Supreme Court of the United States. David Lupton's Sons Company, Plaintiff in Error, vs. The Automobile Club of America, Defendant in Error. Writ of Error. William Forse Scott, William Ford Upson, Attorneys for Plaintiff in Error, 27 William Street, New York, N. Y. Service of a copy of the within Writ of Error is hereby admitted

this 20th day of August, 1909. Niles & Johnson, Attorney- for Defendant in Error, 11 Wall Street, New York, N. Y. U. S. Circuit Court, Southern District, N. Y. Filed Aug. 23, 1909. John A. Shields, Clerk.

4 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY
against
AUTOMOBILE CLUB OF AMERICA.

Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 30th day of August, in the year one thousand nine hundred and seven.

[L. S.] [SEAL.] JOHN A. SHIELDS, *Clerk.*

SCOTT, UPSON & NEWCOMB,
Plaintiff's Attorney-.

Office and Post Office Address 27 William St., Borough of Manhattan, New York City.

[Endorsed:] United States Circuit Court, Southern District of New York. David Lupton's Sons Company, Plaintiff, vs. Automobile Club of America, Defendant. Summons. Scott, Upson & Newcomb, Plaintiff's Attorney-. To the Defendant within named: Take Notice, That upon default judgment will be taken for the sum of 4500. Dollars, in money, with interest from the 15th day of January, 1906, besides costs. Scott, Upson & Newcomb, Plaintiff's Attorneys.

5 I hereby certify, That on the 30th day of August, 1907, at the City of New York, in my district, I served the within Summons upon the within-named defendant Automobile Club of America, by exhibiting to Samuel M. Butler, as Secretary of Automobile Club of America, at No. 247 W. 54th St. N. Y. the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of Bill of Complaint and undertaking in this suit.

WM. HENKEL,
United States Marshal,
Southern District of New York.

Dated August 31, 1907.

(U. S. Circuit Court, Southern District N. Y., Filed Aug. 31, 1907, John A. Shields, Clerk.

6 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Amended Complaint.

For its amended complaint against the above named defendant the plaintiff alleges, upon information and belief:

For a first cause of action:

First. The plaintiff is, and at all the times hereinafter mentioned was, a stock corporation, organized under the laws of the State of Pennsylvania, and a citizen and resident of the State of Pennsylvania within the meaning of the statutes giving jurisdiction to this Court.

Second. The defendant is, and at all the said times was, a corporation, organized under the laws of the State of New York, having its principal office in the City and County of New York, and a citizen of the State of New York and a resident of the Southern District of New York within the meaning of the statutes giving jurisdiction to this Court.

Third. At all of said times the plaintiff was engaged in the business of manufacturing metal window frames and sash at its factories in the State of Pennsylvania and selling the same and causing them to be transported to other states, including the State of New York, and causing them to be there delivered and put in place in the buildings for which they were so manufactured.

Fourth. On or about August 17, 1905, in its said business, the plaintiff entered into a certain contract in writing with the defendant, whereby the plaintiff agreed to provide metal window frames and sashes so manufactured by it and have the same trans-
7 ported from the State of Pennsylvania, and delivered and put in place in the defendant's building, numbers 247 to 259 West 54th Street, New York, and the defendant agreed to pay to the plaintiff therefor the sum of ten thousand three hundred forty-four dollars ($10,344.).

Fifth. By the said contract it was further agreed that the said frames were to be set on or before November 15, 1905, and that said work was to be completed December 15, 1905, that should the plaintiff be obstructed or delayed in the prosecution or completion of its work by the act, neglect, delay or default of the defendant or its architect, or of any other contractor employed by the defendant upon the work, then the time therein fixed for the completion of the work should be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; that the defendant should provide all labor and materials not included in the said contract in such manner as not to delay the material progress of the work, and that

in the event of its failure so to do, thereby causing loss to the plaintiff, it would reimburse the plaintiff for such loss.

Sixth. The plaintiff began promptly to furnish the materials and do the work under the said contract, and was able and willing to set the frames on or before November 15, 1905, and to complete the work December 15, 1905, and would have done so, but the defendant failed to provide the labor and materials not included in the said contract and in particular failed to erect the walls of the building to a sufficient height to allow the frames to be set until long after the said dates and was not prepared to receive the sash and allow them to be hung and the work completed until after February 6, 1907; and the defendant thereby and otherwise delayed the material progress of the work and obstructed and delayed the plaintiff in its prose-
8 cution and completion and thereby caused loss to the plaintiff in the sum of five thousand dollars ($5,000).

Seventh. The plaintiff proceeded under the said contract with all due diligence, and before February 6, 1907, it had provided all of the materials required by the said contract with the exception of a small amount of hardware of a value not exceeding one hundred and twenty-five dollars ($125) and had done all of the work required by the said contract with the exception of hanging the sash.

Eighth. All of the said materials were furnished, and all the said work was done, to the satisfaction of the Architect employed as the agent of the defendant.

Ninth. Said Architect duly certified in writing his approval of the said materials and work to the value of six thousand eight hundred sixty-seven and 90/100 dollars ($6867.90) whereupon the defendant paid to the plaintiff eighty-five per cent (85%) of the said amount, being the sum of five thousand eight hundred and thirty-seven 72/100 dollars ($5,837.72), but has failed and refused to make any further payment.

Tenth. On or about February 6, 1907, the defendant wrongfully and without any cause moving from the plaintiff and against its protest excluded the plaintiff and its employés and workmen from its said building and refused to permit them to hang the said sash, and thereupon and thereafter caused the same to be hung by other persons.

Eleventh. Thereafter and before July 18, 1907, at the defendant's request, the plaintiff supplied said small amount of hardware and remedied certain small defects, all to the satisfaction of the said Architect.

Twelfth. Heretofore and before July 18, 1907, the plaintiff provided all the materials and did all the work required by the said contract and duly performed all the conditions of the said contract on its part, except insofar as such performance was delayed by
9 the defendant and has been rendered in part impossible by the acts of the defendant, as hereinabove alleged.

Thirteenth. At the expiration of thirty days after all of the material was supplied and work done under the said contract as hereinabove alleged, the plaintiff duly requested the defendant's Architect for his certificate in writing that he approved the said materials and

work and that the final payment was due to the plaintiff, but the said Architect has fraudulently and by collusion with the defendant neglected and failed to give such a certificate.

Fourteenth. Of the said sum agreed to be paid under said contract the defendant has failed and refused to pay to the plaintiff the sum of four thousand five hundred six and 28/100 dollars ($4506.28) or any part thereof, altho payment of the same has been duly demanded, and said sum is now justly due and payable.

Fifteenth. The plaintiff has sustained damage in the premises in the sum of five thousand dollars ($5000) with interest thereon from January 15, 1906.

For a second cause of action:

Sixteenth. The plaintiff is, and at all the times hereinafter mentioned was, a stock corporation, organized under the laws of the State of Pennsylvania, and a citizen and resident of the State of Pennsylvania within the meaning of the statutes giving jurisdiction to this Court.

Seventeenth. The defendant is, and at all the said times was, a corporation, organized under the laws of the State of New York, having its principal office in the City and County of New York, and a citizen of the State of New York, and a resident of the Southern District of New York within the meaning of the statutes giving jurisdiction to this Court.

Eighteenth. At all of said times the plaintiff was engaged
10 in the business of manufacturing metal window frames and sash at its factories in the State of Pennsylvania and selling the same and causing them to be transported to other states, including the State of New York, and causing them to be there delivered and put in place in the buildings for which they were so manufactured.

Nineteenth. Between August 15, 1905, and July 31, 1907, at the request of the defendant, the plaintiff sold to the defendant metal window frames and sashes manufactured by the plaintiff in the State of Pennsylvania, and caused the same to be transported from the said State of Pennsylvania to the State of New York, and there delivered to the defendant

Twentieth. Said window frames and sashes were reasonably worth the sum of nine thousand five hundred ninety-four dollars ($9,594).

Twenty-first. Of the said amount, the defendant has neglected and refused, and does still neglect and refuse, to pay the sum of three thousand seven hundred and fifty-six and 28/100 dollars ($3,756.28).

Wherefore the plaintiff demands judgment against the defendant for the said sum of five thousand dollars with interest thereon from January 15, 1906, and the costs of this action.

SCOTT, UPSON & NEWCOMB,
Attorneys for Plaintiff,
27 *William Street, Manhattan Boro, New York City.*

11 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Francis J. McLoughlin, being duly sworn, says: that he is one of the members of the firm of Scott, Upson & Newcomb, the attorneys for the plaintiff herein which is a foreign corporation, that the foregoing complaint is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the grounds of his belief as to all the allegations therein contained is an examination of the contract and correspondence, and statements made by officers of the plaintiff.

FRANCIS J. McLOUGHLIN.

Sworn to before me this 9th day of October, 1907.

[Seal Percy Learned, Notary Public, New York County.]

PERCY LEARNED,
Notary Public, No. 12, N. Y. County.

Certificate filed in Kings and Westchester Counties.

12 *Appearance.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
AUTOMOBILE CLUB OF AMERICA, Defendant.

Notice of Appearance.

SIR: Please to take notice, That the defendant The Automobile Club of America hereby appears in the above entitled action, and that we are retained as attorneys for it therein, and hereby demand that a copy of all papers in this action be served on us at our office, No. 11 Wall St. Borough of Manhattan, City of New York.

Dated N. Y., September 19th, 1907.

Yours, &c., NILES & JOHNSON,
Attorneys for Defendant.

Office and Post Office Address: 11 Wall Street, Manhattan Borough, New York City.

To Messrs. Scott, Upson & Newcomb, Plaintiff's Attorneys.
To John A. Shields, Esq., Clerk.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Sep. 19, 1907. John A. Shields, Clerk.

13 *Answer.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

The defendant answering the amended complaint of the plaintiff herein, by Niles & Johnson, its attorneys,—

I. Denies any knowledge or information sufficient to form a belief as to whether the plaintiff is a citizen and resident of the State of Pennsylvania, and denies on information and belief that it is a corporation duly authorized to do business in the State of New York; and denies on information and belief that the said corporation has complied with the requirements of law of the State of New York to authorize it to do business within such State.

II. Denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs "Third" and "Eighteenth."

III. Answering the allegations of paragraph "Fourth" admits that the defendant entered into a contract with the plaintiff on or about the 17th day of August 1905, whereby the plaintiff was to provide certain materials and do certain work upon the defendant's building, but denies that the defendant agreed to pay the plaintiff therefor the sum of $10,344.00, except as provided by the terms of said
14 contract, and denies that the terms and conditions of said contract are set forth in the complaint, and denies each and every allegation therein not herein admitted or denied.

IV. Answering the allegations of the Fifth paragraph, alleges that said contract provided that no time allowance should be made unless a claim therefor was presented in writing to the architect within twenty-four hours of the occurrence of such delay, and that said contract further provided that if the plaintiff should delay the work so as to cause any damage for which the defendant should be liable, or in the event of any strike or cessation of work caused by the character or condition of labor employed or materials furnished, continuing for eight days, that the defendant should have full authority to arbitrate or adjust the matter, and that plaintiff should make good to the defendant any loss or damage caused, and that said contract further provided that the defendant reserve the right to require such labor on the work as would not conflict with the plaintiff's trade or any other trade, or interfere with the proper and uninterrupted execution of any part of the building operations, and that the agreement of defendant, as alleged in the complaint, was modified by said further provisions of the contract.

V. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the Sixth, Eleventh, Twelfth and Thirteenth paragraphs, and each and every of them.

VI. Denies on information and belief, the allegations of the Seventh, Eighth, Tenth, Fifteenth, Nineteenth and Twentieth paragraphs, and each and every of them.

15 VII. Denies any knowledge or information sufficient to form a belief as to the allegations of the Ninth paragraph of the complaint, except that it admits that it has paid the plaintiff the sum of $5,837.72.

VIII. Denies the allegations of the Fourteenth paragraph, except the allegation that it has not paid the sum of $4,506.28 to the plaintiff, in addition to the sum of $5837.72 above referred to.

For a first and separate defense alleges:

IX. That Sec. 15 of Chap. 563 of the Laws of the State of New York of 1890 as amended, provides that no foreign stock corporation other than a moneyed corporation, shall do business in the State of New York without having first procured from the Secretary of State, a certificate that it has complied with all the requirements of law and that its business is such as may be lawfully carried on in this said State, and that no such corporation shall do business within said State without having procured such certificate, and that no such corporation doing business in said State shall maintain any action in said State upon any contract made by said corporation in said State, unless prior to the making of such contract it shall have procured such certificate. That plaintiff is a foreign stock corporation other than a moneyed corporation, and was at and previous to the time of the making of the contracts alleged in paragraphs Third and Nineteenth of the complaint, doing business in the State of New York, and that neither at the time of entering into said contracts which were made in the State of New York, nor previous thereto had the plaintiff procured from the Secretary of State of the State of New York, the certificate that it had complied with the requirements of law to authorize it to do business in the said State, and defendant further alleges on information and belief that said plaintiff has never procured the certificate of authority to do business required by said statute.

For a second and separate defense, defendant alleges on information and belief:

16 X. That the contract referred to in paragraph Third of the complaint contained, among other terms the provision that all payments for work, labor or services performed or materials furnished, delivered or used in the construction of the premises referred to in the complaint under the contract aforesaid, will be made upon written certificates of the architect to the effect that such payments have become due, and it was mutually agreed between the parties that the final certificate of such architects should be conclusive evidence of the performance of the contract, and that final payment should not be made to the plaintiff upon the performance of the contract until thirty days after the contract had been fulfilled.

XI. That no certificate of the said architect that the said contract had been carried out, performed or fulfilled by the plaintiff, or that the work called for by said contract had been completed to the satisfaction of said architect was ever obtained by the plaintiff before the commencement of this action, and no certificate of the architect to the effect that any payment became due to the plaintiff

for the moneys demanded in the complaint or any part thereof was ever obtained or procured by the plaintiff before the commencement of this action.

For a third and separate defense, the defendant alleges on information and belief:

XII. That in and by the contract set forth in the complaint, the plaintiff agreed to prosecute the work upon the defendant's building, which it was in process of erecting on the premises No. 247 to 259 West Fifty-fourth Street, in the City of New York, with promptness and dispatch and to supply a sufficiency of properly skilled workmen, and that if it should fail in either respect, that after three days'
17 notice to it, the defendant might provide such labor and materials and deduct the cost thereof from any money then due or thereafter to become due to the plaintiff under said contract, and the said contract further provided that the defendant reserves the right to require such labor on the work as should not conflict with plaintiff's or any other trade, or interfere with the proper and uninterrupted execution of any part of the building operations. That said contract further provided that if the plaintiff should delay the material progress of the work so as to cause any damage for which the owner should become liable, or in the event of any strike or cessation of work caused by the character or condition of labor employed or materials furnished, continuing for eight days, that the defendant should have full authority to arbitrate or adjust the matter, and that plaintiff should make good to the defendant any loss or damage caused.

XIII. That on or about the first day of July, 1906, a general strike occurred on the building of the defendant's Club House by reason of the character of the labor employed by the plaintiff, and practically all work stopped upon the said building to the great loss and damage of the defendant.

XIV. That due notice thereof was given to the plaintiff, and it was required to furnish properly skilled workmen in sufficient numbers, and of a character which would permit of building operations being resumed.

XV. That the plaintiff wholly neglected and failed to comply with said notification or to furnish men in accordance with the provisions of said contract, or to complete its work upon said building, and that said general strike and the cessation of work
18 hereinabove referred to, continued for more than eight days.

XVI. That due notice thereof was given by the defendant to the plaintiff, and it was requested to proceed with and complete the work, and that in default of its so doing that defendant would proceed to complete the same at the cost of said plaintiff in accordance with the terms of said contract, but that said plaintiff wholly failed and neglected to do so.

XVII. That thereafter and upon due notice to the plaintiff in accordance with the terms of said contract, defendant proceeded to complete the work covered by plaintiff's contract.

XVIII. That the cost to date of completing the work which plaintiff was to do under its said contract, was the sum of $3820.66.

XIX. That in addition to the amount paid by the defendant to complete the work which plaintiff had agreed to do, defendant suffered damage in at least the sum of Twenty Thousand Dollars ($20,000.00) by reason of the delay in the completion of its building, caused by the failure of the plaintiff to complete its work as agreed, and to do the same in accordance with the terms of the contract.

For a counterclaim to the cause of action set forth in the complaint, the defendant on information and belief alleges:

XX. That in and by the contract set forth in the complaint, the plaintiff agreed to prosecute the work upon the defendant's
19 building, which it was in process of erecting on the premises No. 247 to 259 West Fifty-fourth Street, in the City of New York, with promptness and dispatch and to supply a sufficiency of properly skilled workmen, and that if it should fail in either respect, that after three days notice to it, the defendant might provide such labor and materials and deduct the cost thereof from any money then due or thereafter to become due to the plaintiff under said contract, and the said contract further provided that the defendant reserves the right to require such labor on the work as should not conflict with plaintiff's or any other trade, or interfere with the proper or uninterrupted execution of any part of the building operations. That said contract further provided that if the plaintiff should delay the material progress of the work so as to cause any damage for which the owner should become liable, or in the event of any strike or cessation of work caused by the character or condition of labor employed or materials furnished, continuing for eight days, that the defendant should have full authority to arbitrate or adjust the matter, and that plaintiff should make good to the defendant any loss or damage caused.

XXI. That on or about the first day of July, 1906, a general strike occurred on the building of the defendant's Club House by reason of the character of the labor employed by the plaintiff, and practically all work stopped upon the said building to the great loss and damage of the defendant.

XXII. That due notice thereof was given to the plaintiff, and it was required to furnish properly skilled workmen in sufficient numbers, and of a character which would permit of building operations being resumed.

20 XXIII. That the plaintiff wholly neglected and failed to comply with said notification or to furnish men in accordance with the provisions of said contract, or to complete its work upon said building, and that said general strike and the cessation of work hereinabove referred to, continued for more than eight days.

XXIV. That due notice thereof was given by the defendant to the plaintiff, and it was requested to proceed with and complete the work, and that in default of its so doing that defendant would proceed to complete the same at the cost of said plaintiff in accordance with the terms of said contract, but that said plaintiff wholly failed and neglected to do so.

XXV. That thereafter and upon due notice to the plaintiff in

accordance with the terms of said contract, defendant proceeded to complete the work covered by plaintiff's contract.

XXVI. That the cost to date of completing the work which plaintiff was to do under its said contract, was the sum of $3820.66.

XXVII. That in addition to the amount paid by the defendant to complete the work which plaintiff had agreed to do, defendant suffered damage in at least the sum of Twenty Thousand Dollars ($20,000.00) by reason of the delay in the completion of its building, caused by the failure of the plaintiff to complete its work as agreed, and to do the same in accordance with the terms of the contract.

Wherefore defendant demands judgment that the com-
21 plaint herein be dismissed, and that the defendant have judgment against the plaintiff for the sum of Twenty-three Thousand eight hundred twenty and 66/100 Dollars, ($23820.66) besides the costs and expenses of this action.

NILES & JOHNSON,
Attorneys for Defendant,
No. 11 Wall Street, Manhattan Borough, New York City.

STATE OF NEW YORK,
County of New York, ss:

Colgate Hoyt, being duly sworn says: The foregoing answer is true of my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The reason why this verification is made by me, and not by the defendant is, that the defendant is a domestic corporation, and I am an officer thereof, to-wit, President.

COLGATE HOYT.

Sworn to before me this 1st day of Nov., 1907.
[SEAL OF NOTARY.] JOHN J. CUNNEEN,
Notary Public, N. Y. Co.

22 *Reply.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

The Plaintiff's Reply, on Information and Belief, to the Counter-Claim Contained in the Answer of the Defendant to the Amended Complaint Herein.

First. Referring to paragraph XX of the said answer, the plaintiff denies that by the contract set forth in the complaint the plaintiff agreed to prosecute the work upon the defendant's building with promptness or despatch or to supply a sufficiency of property skilled

workmen or that if it should fail in either respect the defendant might provide such labor or materials or take the cost thereof from any money due or thereafter to become due to the plaintiff, but the plaintiff admits that it was agreed in said contract that if the plaintiff should refuse or neglect to supply such work men or materials, or should fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements in said contract contained, such refusal, neglect or failure being certified by the architect or becoming otherwise known to the owner, the owner should be at liberty after three days' notice to the plaintiff to provide any such labor or materials and to deduct the cost thereof from any moneys then due or thereafter to become due to the plaintiff under said contract.

Second. Referring to paragraph XXI of the said answer the plaintiff has no knowledge or information sufficient to form a belief as to whether a general strike occurred on the building therein
23 mentioned, or as to the reason of any such strike, or whether practically all work stopped upon said building, or whether the defendant incurred any loss or damage.

Third. Referring to paragraph XXII of the said answer the plaintiff has no knowledge or information sufficient to form a belief as to whether due notice was given to the plaintiff or as to whether it was required to furnish skilled workmen in sufficient numbers or of a character which would permit of building operations being resumed.

Fourth. Referring to paragraph XXIII of the said answer the plaintiff denies that it neglected or failed to comply with said notification or to furnish men in accordance with the provisions of the said contract or to complete its work upon said building; and it has no knowledge or information sufficient to form a belief as to whether any cessation of work on said building continued for more than eight days.

Fifth. Referring to paragraph XXIV of the said answer the plaintiff denies that due notice was given by the defendant to the plaintiff as there alleged, and denies that the plaintiff failed or neglected to proceed with or complete the work.

Sixth. Referring to paragraph XXV of the said answer, the plaintiff denies that the defendant completed the work covered by plaintiff's contract, but admits that certain work so covered was done upon said building after plaintiff and its employés and workmen were excluded from said building as shown in paragraph Tenth of the complaint herein.

Seventh. Referring to paragraph XXVI of the said answer, the plaintiff has no knowledge or information sufficient to form a belief as to the cost of doing said work, but that such cost should not have been more than five hundred dollars.

Eighth. Referring to paragraph XXVII of the said an-
24 swer, the plaintiff denies on information and belief that the defendant has suffered damage in any sum by reason of any delay in the completion of its building caused by any failure of the plaintiff to complete its work as agreed or to do the same in accordance with the terms of the said contract.

Ninth. For a defense to the said counterclaim, the plaintiff hereby repeats the allegations hereinbefore made, and also those contained in its amended complaint herein, and makes the same a part hereof; and, the plaintiff further alleges that when the defendant complained of trouble or delay in the erection of the defendant's building in or about the month of July, 1906, it was understood and agreed between the parties hereto that the plaintiff should withdraw its workmen for the time being from the said building and that the defendant should at its own expense have the remaining window frames, twenty-one in number, put in place, the work of setting the said window frames which could be done at a cost of not more than forty-two dollars, being all that was required at that time; and it was then further understood and agreed between the parties hereto that the plaintiff should be allowed to complete its work and hang the sash after the building was in other respects completed and all of the other contractors and workmen were out of it.

Pursuant to that understanding and agreement the plaintiff in the month of July, 1906, withdrew its workmen from the building and waited for an opportunity to complete its work as so agreed. But the defendant finally in the month of February, 1907, wrongfully refused to allow the plaintiff to hang the sash, as provided in the said contract and in said agreement, and proceeded to have the said work done by others.

25 Wherefore the plaintiff demands judgment that the said counterclaim be dismissed with costs.

SCOTT, UPSON & NEWCOMB,
Attorneys for Plaintiff.
27 *William Street, Manhattan Boro., New York City.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Francis J. McLoughlin, being duly sworn, says: that he is one of the members of the firm of Scott, Upson & Newcomb, the attorneys for the plaintiff herein, which is a foreign corporation, that the foregoing reply is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the grounds of his belief as to all the allegations therein contained is an examination of the contract and correspondence, and statements made by officers of the plaintiff.

FRANCIS J. McLOUGHLIN.

Sworn to before me this 18th day of November, 1907.
[SEAL.] PERCY LEARNED,
Notary Public No. 121, *N. Y. County.*

Certificate filed in Kings and Westchester Counties.

26 *Order of Reference.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 7th Day of January, 1909.

Present:

Hon. George C. Holt, Circuit Judge.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
versus
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

On the annexed consent, signed by the attorneys for both parties hereto, it is

Ordered that this action is hereby referred to Edmund Coffin Esq., Counsellor-at-Law, to hear and determine the issues herein.

GEO. C. HOLT,
U. S. Judge.

We consent to the entry of the above order.

SCOTT, UPTON & NEWCOMB,
Attorneys for Plaintiff.

New York, January 5, 1909.

Filed Jan. 7, 1909.

NILES & JOHNSON,
Attorneys for Defendant.

27 *Referee's Opinion.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Opinion.

A motion is made before the plaintiff opens to compel him to elect between two causes of action. The complaint alleges two distinct causes of action, separately numbered, in which the same facts form the basis of the claims against the defendant. The two allegations of causes of action are in fact statements of the same facts in the form of separate counts. The first alleges delivery of the goods and a specific contract, by which the defendant became liable to pay; the second alleges delivery of the same goods without alleging any specific contract, and claims payment on the implied promise to pay. Motion is made to compel the plaintiff to elect upon which count he will proceed to try the case. Under the practice in the Courts of the

State of New York this double statement of what may be called a single cause of action seems to be allowed in any case where for any reason the plaintiff has doubt of his ability to show
28 express contract of the defendant; as when the contract was signed by an agent and the proof of agency may fail, Bank v. Hartshorn, 37 Hun. 101; or when the alleged contract is by parol and possibly invalid under the Statute of Frauds, Day v. New York Central Railroad Co., 51 New York, page 583, Reed v. McConnell, 133 New York 425. In all of these cases this statement of the plaintiff's claim under two counts seems to have been approved. In the case at bar the plaintiff alleges a first cause of action on contract. If for any reason he considers that he may not be able to prove his contract, but may be able to prove that the defendant has received from him the goods mentioned for which the defendant should justly compensate him, he is justified in repeating the facts as a second cause of action to meet that contingency and should not be compelled to elect between his two causes of action at least until after the evidence has been received. The motion to compel him to elect before any evidence is given is therefore denied.

See also

U. M. Realty & Imp. Co. v. Roth, 193 New York, 570.
Rubin v. Cohen, 129 App. Div., 395.

The plaintiff corporation, David Lupton's Sons Company, is organized under the laws of Pennsylvania as a stock corporation and engaged in a general business of manufacture and installation of metal windows and window frames. The defendant, The Automobile Club of America, is a corporation organized under the
29 laws of the State of New York, and in 1905 was about to erect a club house in the City of New York. In response to requests for bids for work upon this club house which were called for by Mr. Ernest Flagg, the architect of the Automobile Club, the plaintiff in writing offered to furnish all materials and labor of every character and description called for by the architect's specifications under the heading Metal Window Frames; the offer was accepted and formal contract made between the plaintiff and defendant dated August 17, 1905. By this contract the plaintiff agreed as follows: to provide the materials and perform the work of furnishing and putting in place of metal windows frames and sashes for all windows throughout the building, including the furnishing and applying of all hardware, weights, chains, pulleys etc., for the entire consideration of $10,344, and to complete same, frames to be set on or before November 15, 1905, and work to be completed December 15, 1905. According to the specifications there was no requirement that the window frames and sashes should be of the plaintiff's own manufacture or of any particular manufacture or that they should be manufactured in any particular place, or brought from any special State.

For some reason not explained by the testimony the building progressed slowly and was not sufficiently advanced that the frames could be set until the year 1906. But the plaintiff did not raise any special objection to this delay nor refuse to proceed with the con-

tract on that account. In July of that year the plaintiff had
30 manufactured in Philadelphia all the frames and sashes and had set a large number of the window frames in the building in New York. According to the plaintiff's testimony the contract called for 326 window frames of various sizes and character and in July there had been set all but 21 of these. The work had been done to satisfaction of the architect, who gave his certificate for $6,867.90 and $5,837.72 was paid upon the contract price, being 85 per cent of the certificate.

In July, 1906, a dispute between the plaintiff corporation and the Labor Union of Mechanics who were employed in the City of New York in work upon metal windows came to a crisis. Exactly what the difficulty was does not appear from the evidence. The plaintiff had run its factory in Pennsylvania as a union shop, according to the union requirements at that place in 1905; but at the end of that year had declared it an open shop. It seems to have been paying or offering to pay the prevalent rate or wages in New York City, but there is no evidence whether or no it was employing members of the local unions to do the work of setting the frames in the building. The union seems not to have been satisfied unless the frames and sash themselves, which were to be used in this building, should have been actually made in New York or at least East of the Hackensack River, and by it- own members. There is no evidence to the effect that this trouble was organized or fomented by the defendant, or that the defendant was in any way responsible for it. Whatever the
31 dispute, at all events in July, 1906, all the Labor and Trade Unions joined in refusing to go on with any work in further construction of this building unless the plaintiff withdrew. After many attempts at conciliation, the plaintiff admitted to the defendant that it was unable to come to any agreement with these labor organizations, by which the building could be proceeded with, and the plaintiff continue to do this part of the work. At about that time all work on the building had stopped, except that of some employees of the plaintiff. At an interview had July 12, 1906, between representatives of the two corporations it was agreed, according to the testimony of Mr. Lupton, that the plaintiff should withdraw from the work temporarily, the defendant procure the remaining 21 window frames to be set at its own expense and complete the building, except the hanging of the sash, after which the plaintiff should be allowed to come back and supply and hang the sash, as called for by the contract. According to the testimony of Mr. Flagg, the architect, and Mr. Morris, the president of the Automobile Club, the agreement was that the plaintiff should withdraw altogether from the work, and the defendant should complete this contract as best it could and deduct the cost from the unpaid balance on the contract. Each party wrote to the other after this conference a letter embodying the understanding as so stated, and each repudiated the understanding as expressed by the other; so that no written alteration of the original contract was made; but the defendant paid to the plaintiff the sum of $3,200, according to the architect's certificate by check dated
32 July 18, 1906, and the plaintiff gave a written receipt of that sum as paid under the contract, dated July 19, 1906.

Upon receiving this payment the plaintiff withdrew its men from the building, and the defendant employed The Manhattan Fireproof Door Company to complete the setting of the window frames called for in the plaintiff's contract. This concern was a competitor in business of the plaintiff and so far as appears was a party to the action of the Trade Combination in forcing the plaintiff from the building. The principal officer of The Manhattan Fireproof Door Company was a member of the Board which approved and effectually sustained the demands of the Labor Union against the plaintiff. But the undisputed testimony of the defendant is to the effect that by no other means than the employment of this concern could the building have been continued; the engagement of this Company to go on with the sash was on notice to the plaintiff, and no proof of any bad faith on the part of the defendant has been offered.

Early in 1907, the building was nearly ready to have the sash hung. It does not seem to have been completed in other particulars; for the persons having other contracts upon the building at that time appear to have suspected some design on the part of the defendant to allow the plaintiff to supply and hang these sash after the rest of the work was done; and in order to prevent that, notice was in some way given on the part of these other tradesmen that the contract for this sash must be completed by some one else
33 than the plaintiff; and the defendant was forced to submit to this demand or go without its building. Another conference between the representatives of these two corporations was held at which an offer to complete the Lupton contract was submitted by this Manhattan Fireproof Door Company, at cost and ten per cent, not to exceed $2,900, provided the sash were delivered to fit the frames. The plaintiff objected to this cost as outrageous and refused to consent to such a contract; but offered no suggestion of any other means by which the building could be finished under the circumstances. The defendant thereupon made the contract with this Manhattan Fireproof Door Company to complete at cost and ten per cent added not to exceed $2,900, on the condition mentioned. No testimony is offered to show that the defendant acted in any but good faith, or that the building could have been finished by any other course of action. The Manhattan Fireproof Door Company then went on and did complete the contract with the exception of some special hardware attachments, which the plaintiff itself supplied afterwards and the work required by the original contract was finally completed on the 17th day of July, 1907.

The total agreed payment under the contract was.....	$10,344.00
The plaintiff has received.....	5,837.72
Leaving unpaid to it.....	$4,506.28
The defendant has paid to The Manhattan Fireproof Door Company for the performance of that part of the contract which the plaintiff did not complete.....	$3,796.76
Leaving a balance of.....	$709.52

34 This expense of completion is made up of cost of completing the setting of the frames, prior to December, 1906 ..... $709.28
Cost of hanging sash after February, 1907..... $3,085.48

$3,796.76

The cost of hanging the sash exceeds the limit of the contract made with The Manhattan Fireproof Door Company in February, 1907, by $185.48 and this is claimed to have been made necessary by reason of defective condition of the sash which the plaintiff had delivered. The sash which the plaintiff had manufactured for the building were actually used in it and delivered by the plaintiff for that purpose after the plaintiff had withdrawn from the building in July, 1906, under the circumstances recited.

In connection with these facts reference must be made to Article VIII of the contract between these parties.

This article reads as follows:

ART. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), or, in the event of any strike or cessation of work, caused by character or condition of labor employed or material furnished, continuing for 8 days, that the Owner shall have full authority to arbitrate or adjust the matter and the Contractor shall make good to the Owner any loss or damage caused. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect or by arbitration, as provided in Art. III of this contract.

35 The last clauses of this Eighth Article relate to just that class of difficulties as those which arose in this matter between the plaintiff and the Labor Union known as Local No. 11 of Sheet Metal Workers and the combination of the employers. Such questions if they arose by this clause in the contract were to be adjusted by the architect as arbitrator, in the same manner as other questions between the owner and contractor were agreed to be arbitrated by him. The parties seem to have so understood the contract. They met with the architect and he did do the best he could to adjust the matter. His adjustment was an act of arbitration. The parties may not have been irrevocably bound to go on with this arbitration at first. No unexecuted arbitration agreement is irrevocable. But having proceeded with it and the adjustment having been made, the power of revocation is lost.

Wood v. Tunnicliff, 74 N. Y. 38.

The plaintiff had a further right under this Eighth Article to ask that this matter be adjusted by three arbitrators to be elected as provided in the Third Article of the contract. But there is no

evidence that he asked for such arbitration as preferable to adjustment by the architect.

Wiberly v. Matthews, 91 N. Y. 648.

36 The defendant claims that the complaint should be dismissed altogether because the plaintiff failed to procure the certificate of the architect to the effect that the building had been completed. Undoubtedly if the plaintiff had not been interfered with in the prosecution of the work and was now claiming final payment in the usual course of business, it would have been necessary for it to show that the architect had given a certificate of some character to the effect that the work had been completed to his satisfaction, or to show that the architect refused to give certificate for some improper reason. Neidlinger v. Onward Construction Company, 107 App. Div. 398, and cases cited. But it affirmatively appeared in the examination of the plaintiff's witnesses that the owner took possession of the building and itself caused the completion of the work or proceeded to do so, claiming the right to exclude the plaintiff under clauses of the contract. This relieves the plaintiff from necessity to produce architect's certificate.

Weeks v. O'Brien, 141 N. Y. 199.

It is true that the evidence shows also that after the defendant had taken possession of the building and had by other workmen practically completed the work called for by the plaintiff's contract, the plaintiff was asked to do some alterations. The mechanical attachment to some of the casemate windows proved to be too light for the purpose. The plaintiff removed these fixtures and substituted heavier ones of the same character. No claim is made for
37 this work as an extra and the defendant has paid for the materials. So no architect's certificate can be required in regard to this matter. The reason assigned by the Court in the case of Weeks v. O'Brien cited applies to this case and relieves the plaintiff from the condition of producing architect's certificate as a part of its cause of action.

As to the defendant's defense of expense of completion, the architect has arbitrated and adjusted the matter and has given his certificate. In absence of any evidence attacking the good faith of Mr. Flagg, the architect in this case, this certificate is conclusive between the parties. The reasoning of the opinion in the case cited in 107 App. Div. 398 apply to this certificate.

The architect gives no certificate or evidence as to any damages for delay to either party. All the circumstances of this peculiar affair were under his observation. He was made by contract the arbitrator between the parties, and the lack of any award of damages by him to either for reason of delay is fatal to a recovery by either on this item. The defendant expressly withdraws the counterclaim on its part. The plaintiff fails to show any damage by reason of delay.

The plaintiff on these facts would be entitled to recover $709.52, with interest from the date of completion, if it could recover at all in this action.

But it is claimed that the evidence clearly shows that the reasonable value of the completion of the work included in the
38 plaintiff's contract after the plaintiff's men were withdrawn from the building, was much less than the amount actually paid by the defendant and certified for by the architect. There is testimony certainly to this effect. Assuming that the frames and sash, which constitute all the material, were furnished by the plaintiff, the testimony of Mr. Rupp, who is a disinterested and competent witness, is that this material could have been placed in the building by 120 days' labor of a good, willing, competent workman and the same number of days of a helper. But Mr. Rupp admitted that although he was an employer in that line of business, he could not have procured any men anywhere to finish this particular contract. Mr. Lupton himself says that he would not have supplied such labor in any other similar emergency. There is no testimony tending to show that any other body of men than those who were employed could have been hired for any amount of money to do this work, but the whole testimony is to the effect that unless these men who performed this labor had been employed to do it, the building would have stood unfinished to this day. What was wanted to complete the contract was labor, not material. It is immaterial to say that 120 days' labor was required and that the prevalent rate of wages for metal workers at that time was $5.00 or $4.56 a day. The question is not to be settled in this way; but by ascertaining what was the necessary cost to this defendant of setting the frames and hanging the sash in this particular building in 1906 and 1907. If it was impossible to procure any other men than those who actually
39 were employed, and if those men were not good, willing and competent workmen, but were poor, unwilling and incompetent for the kind of work, we must take the cost of the work by that class of workmen, at that time and in this building. There is not the slightest evidence that the defendant, or Mr. Flagg, as architect of the building, could have procured this particular labor to have been performed in this particular building on these particular frames and sash for one cent less than the amount paid out and certified by Mr. Flagg. So far as the evidence goes, if Mr. Flagg had not succeeded in persuading these workmen to hang the sash and set the frames which the plaintiff had made for these windows, the entire material would needs have been purchased from some other party and the amount of the claim of the defendant against the plaintiff would have been increased to that extent. The amount paid out by the defendant as stated is the legal damage of the defendant if it is entitled to any off-set at all. The contract of the plaintiff expressly agrees to pay to the defendant the loss or damage arising from a strike caused by character or condition of labor employed or material furnished by the plaintiff, the same to be adjusted by the architect.

The plaintiff is a foreign stock corporation. It has never filed a copy of its charter or certificate of incorporation with the Secretary of the State of New York, nor procured any certificate from such Secretary authorizing it to do business in this State, nor designated

any agent to reside in this State, nor paid any license tax, as required by Sections 15 and 16 of the General Corporation
40 Law of New York, and Section 181 of the Tax Law. Prior to the making of the contract mentioned it had been doing business in this State extensively. It had an office here in this City, its agent was actively managing its affairs, it issued business cards from the office here and had a large number of contracts of the same general character as the one in suit for installation of windows in this State. The contract with the defendant was in direct line of this business and was made on a bid submitted on behalf of the plaintiff by its New York business agent in New York and for the work of constructing a building in this City. The contract in evidence itself describes the plaintiff as of the City, County and State of New York. The document was apparently drawn on a blank used by Mr. Flagg, who is a New York architect, it was signed and sealed by the plaintiff in Philadelphia and mailed to the agent of the plaintiff in New York, who handed it in New York to the architect for the signature and seal of the defendant, which were then affixed in this City. It was undoubtedly a New York contract delivered here and all liability of both parties had its inception here on such delivery.

Tilden v. Blair, 21 Wall. 291.
Barry v. Equitable Life Assurance Society, 59 N. Y. 587.
Western v. Genessee Mutual, 12 N. Y. 258.
Lee v. Selleck, 33 N. Y. 615.
Hooley v. Talcott, 129 App. Div. 233.

The case seems to be covered in every respect by the pro-
41 vision of Section 15 of The General Corporation Law of New York, Chapter 563, Laws of 1890, as amended. Chapter 583, Laws of 1901. The defendant has properly pleaded this issue. Under the decisions of the State Courts this contract is absolutely void as having been made in violation of law and the plaintiff has not made out a cause of action entitling it to any affirmative relief from the Courts.

Union Trust Co. v. Sickels, 125 App. Div. 605.
Wood v. Ball, 190 N. Y. 217.
South Bay Co. v. Howey, 190 N. Y. 240.

The New York State Courts have held in many cases that similar statutory requirements, which are made conditions precedent to the lawful exercise of corporate powers can be enforced by absolute invalidation of contracts made in violation of them.

Anglo American Pro. Co. v. Davies Pro. Co., 169 N. Y. 506, 510 and cases cited.
People ex rel. Williams v. Metz, 193 N. Y. 148.
Johnson v. Dahlgreen, 166 N. Y. 354.
People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454.

These cases also are authorities that the defense can be set up by any one who is proceeded against and if pleaded as a defense it is no

sufficient reply that the defendant has received the benefit of the contract and retains it.

The case of Groton Bridge Co. v. American Bridge Co. 151
42 Federal Reports 871, is cited by counsel on both sides as the only Federal decision directly applicable to these provisions of the New York Statute. In this case the defendant was a foreign corporation doing business in the State of New York without compliance with this Statute. When sued in the Federal Court in the Southern District of New York, it alleged as a counterclaim a cause of action arising under a contract which had been made in New York in the course of that business and the question arose on demurrer to the counterclaim. Judge Ray in the opinion says

"If the highest Court of the State has given construction to its Statutes fixing the conditions on which a foreign corporation may do business in the State and held they make all contracts entered into by it without complying with such conditions void, and they do not directly relate to interstate commerce, or discharge citizens from their contract obligations or are not repugnant to the Constitution, and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or those principles of natural justice which forbid condemnation without opportunity for defense, then the Courts of the United States are bound by and give effect to such construction." "But," he adds, "such contracts are not necessarily void because of non-compliance with such conditions and the Court of Appeals (of New York) has not given such a construction to the Statutes referred to." This case was decided March 21,
43 1907. In December, 1907, the Court of Appeals in New York held in the case of Wood & Selleck v. Ball, 190 N. Y. 217, in the words of the prevailing opinion of Judge Vann,

"The procuring of a license must precede the transaction of business or the contracts of the corporation are not lawful. Aside from the provisions withholding legal remedies, no such corporation can lawfully make contracts in this State without obtaining the certificate in advance. * * * These are the conditions upon which it (the foreign corporation) is permitted to enter the State for the purpose of carrying on business. Until it complies with them and procures a certificate from the Secretary of State that it has complied with them it cannot carry on business here except in violation of law."

The plaintiff seeks to avoid the effect of these decisions by claim that this contract was one of interstate commerce, and that this State regulation as applied to the plaintiff corporation would be interference with commerce and contrary to the provisions of the United States Constitution. It is difficult to imagine a business more strictly local and domestic than the building of a house, or a contract more distinct from interstate commerce, than an agreement by which a company described as of the City, County and State of New York undertakes to provide materials and perform the work of building in the windows of a club house in Fifty-fourth Street for a New York City Automobile Club. When the specifications for the work are examined it appears that there is no reference to any foreign-made material whatsoever; but that the window frames and sash are ex-

pressly to comply with the local and domestic provisions of
44 local authorities. The only other provisions of the contract as to place of the manufacture is that in Article VIII before cited to the effect that no material shall be used which may cause a strike of workmen and if this Article be read in connection with the regulation of the Trades Unions, which the witnesses testified to, requiring that the frames and sash should be made in New York State. It is not shown that both parties to this action knew of any such regulation when the contract was made. But it does appear that the plaintiff had been a member of the Employer's Association in New York City until a year before making this contract; and it was this Association apparently which approved the strike on this building in consequence among other things of the violation of this regulation.

The provisions of the law of New York may not be allowed to restrict the right of a foreign corporation to do in New York State a regular business of import and export. Certainly there is nothing of that sort involved in the contract in suit. In the case of Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, the Court in describing a matter of interstate commerce says, "The case is entirely different from that of foreign corporations seeking to do business which does not belong to the regulating powers of Congress. The insurance business for example cannot be carried on in a State by a foreign corporation without complying with the conditions imposed by the legislature of that State. So with regard to manufacturing
45 corporations and all other corporations whose business is of a local and domestic nature."

So also in the case of Butler Bros. Shoe Co. v. United States Rubber Co., 156 Federal Reports 1, the decision distinctly holds that the foreign corporation, the defendant, was not doing business in Colorado. The Court says,

"Let us now turn to the contracts, observe what the Rubber Company agreed to do and what it actually did under them and determine if possible whether or no in making and performing these agreements it was guilty of doing any business within the meaning of the Constitution and Statutes of Colorado. It agreed to ship the goods from its warehouse or its mill (in Ohio) upon the order of the appellee to that Company in Denver and it did so. It contracted to do and it did nothing more. It never had any office or place of business in Colorado. It never received, stored, handled or sold any goods or collected any money for the sale of any goods in that State under this contract. It never incurred, assumed or paid any expenses of doing all these things or of conducting any of the business. The Shoe Company (that is the other party, the local corporation) had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it agreed to bear all the expenses and losses of receiving, storing and selling the goods; and it did so."

Under these circumstances the question was solely be-
46 tween the consignor and its factor.

The only interstate commerce connected with this con-

tract was injected into it by the undisclosed intention of the plaintiff to manufacture the frames and sash in Pennsylvania, and to bring them itself to New York for use in this building. In this respect the case is on all fours with that of

Diamond Glue Co. v. United States Glue Co., 187 U. S. 611; 103 Federal Reports 838.

In that case the foreign corporation agreed to supervise the building of a mill in Wisconsin and its operation for five years and to purchase all the product of the mill for the time. The foreign corporation intended to export from Wisconsin all this product, and the cost of the superintendence was a very small percentage of the value of the goods which were to be so exported. But the Supreme Court held that this undisclosed intention to export did not impart to the contract such a character of interstate commerce as to relieve the foreign corporation from liability to regulation by the State of Wisconsin by legislation similar to that of the State of New York. This case was brought by the foreign corporation in the Circuit Court of the United States, and the defendant interposed by its answer a Wisconsin Statute quite similar to the one now pleaded. It is the highest authority for the rule that Federal Courts should construe and apply such State Statutes in the same manner as the Courts of the State.

To the same effect are cases from State Courts.

47 Hastings Industrial Company v. Moran, 143 Mich. 679:

Where the contract was by an Illinois corporation to construct a factory in Michigan and equip it with machinery made in Illinois.

West Jersey Ice Manufacturing Co. v. Armour, 12 Penn. Sup. Cts. 443:

Where the contract was to supply in Philadelphia ice, which the foreign corporation intended to manufacture in New Jersey, but did not expressly so contract.

St. Louis Expanded Metal Fireproofing Co. v. Beilharg, 88 S. W. Rep. 572:

Where the contract was by a Missouri corporation to do construction work in Texas with material prepared in Missouri but put into the building by labor employed by a foreign corporation in Texas.

Portland Company v. Hall & Grant Construction Co., 121 App. Div. 779:

Where the foreign corporation contracted to supply materials for and to construct elevators for a building in New York and actually constructed them furnishing the labor necessary therefor.

This is not a case of simple sale of a single article by a local salesman.

Penn. Collieries v. McKeever, 183 N. Y. 98.

Robbins v. Taxing District Ohio, 120 U. S. 489.

Atlas Engine Works v. Parkinson, 161 Fed. 233.
Caldwell v. North Car, 187 U. S. 622.
Millen Milling Co. v. Gerten, 93 Tenn. 590.
Rearich v. Pennsylvania, 203 U. S. 511,
and similar cases.

48 The plaintiffs on the contrary organized a regular business in New York, hired offices, used stationery and business cards claiming residence in New York, had been a member of the local Board of Employers until excluded from it for some reason not explained by the evidence, and were actually themselves employing a body of workmen in this City to execute this very contract with others similar to it. They were endeavoring to enjoy all the advantages of a Business Corporation in the State of New York without submitting in any way to the supervision of New York authorities or contributing to New York taxes.

The complaint should be dismissed.

18th May 1909.

EDMUND COFFIN, *Referee.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed May 20, 1909. John A. Shields, Clerk.

49 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Findings of Fact.

I, Edmund Coffin, Referee to whom this action was referred by order dated the 7th day of January, 1909, respectfully report:

That I duly took oath as Referee on the 20th day of January, 1909, which affidavit is hereto annexed.

That I have been attended by Messrs. Scott, Upson & Newcomb, as attorneys for the plaintiff, and Messrs. Niles & Johnson, as attorneys for the defendant, and have heard the proofs offered on behalf of both parties, and after consideration of the said proofs I do find the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. That plaintiff is a foreign business stock corporation other than a moneyed corporation, incorporated under the laws of the State of Pennsylvania.

2. That the defendant is a domestic corporation incorporated under the laws of the State of New York.

3. That on or about the 17th day of August, 1905, the de-
50 fendant entered into a written contract in the City of New York in the State of New York with the plaintiff whereby

the plaintiff agreed to manufacture and place in position upon the premises of the defendant at No. 247 to 259 West 54th Street, New York City, metal window frames and sash, necessary for the building to be erected by the defendant upon the said premises, and to provide all the materials and perform all the work necessary in connection therewith for the sum of $10,344.00.

4. That at the time of entering into said contract, the General Corporation Law of the State of New York, being Chapter 563 of the laws of 1890 as amended to that date, provided among other things as follows:

"SECTION 15. Certificate of authority of a foreign corporation. No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December thirty-first, eighteen hundred and ninety-two, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to
51 the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word "trust", "bank," "banking," "insurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," or "benefit," as a part of its name."

"SECTION 16. Proof to be filed before granting certificate. Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the State, and a place within the State which is to be its principal place of business, and designating in the manner prescribed in the code of civil procedure a person upon whom process against the corporation may be served within the State. The person so designated must have an office or place of busi-

ness at the place where such corporation is to have its principal place of business within the State. Such designation shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this State. If the person so designated dies or removes from the place where the corporation has its principal place of business within the State, and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, the secretary of state may revoke the authority of the corporation to do business within the State, and process against the corporation in an action upon any liability incurred within this State before such revocation, may, after such death or removal, and before
52 another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address or the address of any officer thereof is known to him."

5. That said contract entered into between the parties hereto on or about the 17th day of August, 1905, provided among other things as follows:

"ART. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), or, in the event of any strike or cessation of work, caused by character or condition of labor employed or material furnished, continuing for 8 days, that the Owner shall have full authority to arbitrate or adjust the matter and the contractor shall make good to the Owner any loss or damage caused. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect or by arbitration, as provided in Art. III of this contract."

"ART. III. No alteration shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Architect, and when so made, the value of the work added or omitted shall be computed by the Architect, on written notice to each of the parties hereto, who shall also be notified in writing of the amount so fixed, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties
53 hereto shall pay one-half of the expenses of such reference."

And that Ernest Flagg was the architect referred to.

6. That at the time of entering into said contract and for some time prior thereto, the plaintiff was doing business within the State of New York, within the meaning of said Section 15 of the General Corporation Law of the State of New York.

7. That the plaintiff had not procured from the Secretary of the State of New York, a certificate, as required by said Section 15 of the General Corporation Law of the State of New York, prior to doing business in the State of New York, or prior to entering into the contract sued on herein.

8. That the plaintiff had been doing business within the State of New York prior to and at the time of entering into the contract with the defendant without having procured a certificate from the Secretary of the State of New York, as required by Section 15 of the General Corporation Law of the said State.

9. That the plaintiff failed to set at least 1 of the frames which it was to set under the terms of its said contract with the defendant.

10. That the plaintiff failed and neglected to hang all the sash to be hung by it under its said contract with the defendant.

11. That under its said contract with the defendant the plaintiff was to hang about 731 sash.

12. That the plaintiff hung only about 42 sash.

13. That on or about the 3rd day of July, 1906, a strike
54 occurred upon the building of the defendant upon which the plaintiff was at work, and the men of all the trades employed upon said building, except the men who were employed by and working for the plaintiff, left the *the* building.

14. That the strike occurred and all the other trades left the building because of the character of the labor employed and material furnished by the plaintiff.

15. That the plaintiff failed, refused and neglected to furnish labor that would not conflict with its own or other trades in the execution of the building operations of the defendant.

16. That the defendant duly notified the plaintiff of said strike and that it should proceed with its work.

17. That the defendant duly notified the plaintiff that it should furnish labor and supply material which would not conflict with its own or any other trade or interfere with the proper and uninterrupted execution of the building operations.

18. That plaintiff continued and has at all times continued to fail, refuse and neglect to provide suitable labor that would not conflict with the other trades in the execution of the building operations of the defendant and to proceed with its work.

19. That on or about the 21st day of July, 1906, the defendant under adjustment of Ernest Flagg as such architect entered
55 upon the premises and took possession of the same for the purpose of completing the work comprehended under its contract with the plaintiff, and employed other persons to complete the same.

20. That the plaintiff expended in completing the work covered by the plaintiff's contract with the defendant, so far as the same was completed by the defendant, the sum of $3,796.76, and has been certified by Ernest Flagg, as such architect.

21. That defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by plaintiff.

22. That the plaintiff has been paid on account of the work to be done by it on its contract with the defendant the sum of $5,837.72.

23. That the difference between the amount unpaid upon the contract and the expense to the defendant of doing the work left undone by the plaintiff is the sum of $709.52.

Conclusions of Law.

I. That the plaintiff has violated a statute of the State of New York, to wit, the General Corporation Law of said State.

II. That the contract sued on was procured in violation of a statute of said State and was void and unenforcible by the plaintiff.

III. That the plaintiff cannot maintain an action upon said contract.

IV. That the plaintiff has failed to make out a cause of
56 action against the defendant.

V. That upon the plaintiff's failure to proceed with the work and to perform its said contract, the defendant was justified in completing the same on its own account and charging the balance thereof to the plaintiff.

VI. That defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by the plaintiff.

VII. That the defendant has a counterclaim or set off in the sum of $3,796.76 and said amount should be allowed it and deducted from the sum, if any, due and owing to the plaintiff over and above the amount paid them on account of their contract with the defendant.

VIII. That the complaint herein should be dismissed with costs.

18th May, 1909.

EDMUND COFFIN, *Referee.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed May 20, 1909. John A. Shields, Clerk.

57 *Order.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

This case having been, by an order of the Court entered January 7, 1909, referred to Edmund Coffin, Esq., as referee to hear and determine, and a report signed by the Referee having been filed in the Clerk's Office May 20, 1909; and plaintiff now moving, under an order to show cause with stay of entry of judgment, for an order to recommit the said report to the Referee with leave to plaintiff to submit proposed findings,

Now on reading the affidavit of Francis J. McLoughlin, sworn to May 27, 1909, and after hearing Wm. F. Scott, Esq., of counsel for the motion and William W. Niles, Esq., of counsel opposed,

It is ordered that the motion be and it hereby is granted; that the said report be recommitted to the said Referee; that either party may thereupon and within ten days after notice of entry of this order submit to the said Referee, for his action thereon, proposed findings of fact and conclusions of law.

Dated, New York, June 9th, 1909.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jun- 9, 1909. John A. Shields, Clerk.

58 *Order Resettling Order of June 9, 1909.*

At a Stated Term of the Circuit Court of the United States Held in and for the Southern District of New York, at the Court Rooms, in the Post Office Building, in said District, on the 22nd day of June, 1909.

Present:

Hon. E. H. Lacombe, Justice.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

On reading and filing the annexed consent of the attorneys for the parties hereto dated the 21st day of June, 1909, and upon reading the order therein referred to entered herein in the office of the Clerk of this Court on the 9th day of June, 1909, and on motion of Niles & Johnson, attorneys for the defendant, it is—

Ordered that the said order of the 9th day of June, 1909, be and the same is hereby resettled so as to read as follows:

59 At a Stated Term of the United States Circuit Court Held in and for the Southern District of New York, at the Court Rooms, in the Post Office Building, in said District, on the 9th Day of June, 1909.

Present: Hon. E. Henry Lacombe, Judge.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

This case having been on order of the court entered January 7th 1909, referred to Edmund Coffin, Esq., as Referee, to hear and determine, and a report signed by the Referee having been filed in

the Clerk's office May 20th 1909, and plaintiff now moving under an order to show cause with stay of entry of judgment, for an order to recommit the said report to the Referee with leave to plaintiff to submit proposed findings,—

Now, upon reading and filing the said order to show cause dated the 27th day of May 1909, and the affidavit of Francis J. McLoughlin sworn to May 27th 1909 in support of said motion, and the affidavit of William W. Niles affirmed to the 4th day of June 1909 in opposition thereto, and after hearing William F. Scott, Esq., of counsel for the motion, and William W. Niles, Esq., of counsel opposing, it is—

Ordered that the motion be and it hereby is granted; and
60 the said report be recommitted to the said Referee; that either party may thereupon and within ten days after notice of entry of this order submit to the said Referee for his action thereon, proposed findings of fact and conclusions of law.

____ ____,
U. S. C. Judge.

We consent to the settlement of the above order as above, June 21.

SCOTT, UPSON & NEWCOMB,
Plaintiff's Attorneys.

We consent to the re-settlement of the order as above so that it may be correct in its recitals and form although we oppose the decision of the court therein made and do not hereby waive any right to have same reviewed, vacated or reversed as resettled.

Dated June 21, 1909.

NILES & JOHNSON,
Att'ys for Def't.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jun- 22, 1909, John A. Shields, Clerk.

61 *Exception to Order.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Please take notice that the defendant excepts to the decision and order of the Circuit Court dated June 9th 1909, and entered and filed June 9th 1909, recommitting the Referee's Report in this action to Edmund Coffin, Esq., the Referee, for action on proposed additional findings of fact and conclusions of law.

Dated New York, N. Y., July 8th 1909.

Yours, etc.,
NILES & JOHNSON,
Attorneys for Defendant, No. 11 Wall Street, Manhattan Borough, New York City, N. Y.

To Scott, Upson & Newcomb, Esqrs., Attorneys for Plaintiff.

(Endorsed:) Service copy of within admitted. July 8, 1909. Scott, Upson & Newcomb, Att'y for Pl'ffs.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 8, 1909. John A. Shields, Clerk.

62 *Plaintiff's Additional Findings of Fact, etc.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

I, Edmund Coffin, the Referee to whom the report in this action was recommitted by order dated June 9, 1909, for action on any proposed additional Findings of Fact and Conclusions of Law, respectfully report.

That proposed additional Findings of Fact and Conclusions of Law were submitted to me on behalf of the plaintiff on the 19th day of June, 1909. No proposed additional Findings of Fact or Conclusions of Law have been submitted to me on behalf of the defendant.

The following are the Findings of Fact so proposed on behalf of the plaintiff and my action thereon:

I. The plaintiff is, and at all times mentioned in the complaint was, a stock corporation organized under the laws of the State of Pennsylvania and a citizen of said State within the meaning of the statutes giving jurisdiction to this Court.

I so find, so far as that the plaintiff was a stock corporation organized under the laws of the State of Pennsylvania; any rights of citizenship follow as a Conclusion of Law. I do not find them as a fact.

II. The defendant is, and at all the said times was, a corporation organized under the laws of the State of New York, having its principal office in the City and County of New York, and a citi-
63 zen of the State of New York and a resident of the Southern District of New York within the meaning of the statutes giving jurisdiction to this Court.

I so find, so far as that the defendant was a corporation organized under the Laws of the State of New York having an office in the City of New York. Any right of citizenship follows as a Conclusion of Law. I do not find them as a fact.

III. In order to obtain a certificate of authority to do business within the State of New York under Section 15 of the General Corporation Act of said State it was necessary at the time in question herein, to pay to the Secretary of State a fee of $10, and to the State Treasurer a franchise tax.

Found as requested.

IV. According to the Code of Civil Procedure of the State of New York no reply was required or allowed to the defense founded upon Section 15 of the General Corporation Law of said State.

Found as requested.

V. At all of said times the plaintiff was engaged in the business of manufacturing metal window frames and sash at its factories in the State of Pennsylvania and selling the same and causing them to be transported to other states, including the State of New York, and there delivered and put in place in the buildings for which they were so manufactured.

Found as requested.

64 VI. The cost or price of putting in place such frames and sash did not exceed on the average 7½ per cent. of their value or price.

Found as requested as to the general business of the plaintiff.

VII. For the purpose of such business only the plaintiff had a representative and an office in the City of New York, but did no business otherwise in the State of New York. Plaintiff's said representatives solicited orders, incidentally negotiated in affairs there, and used the said office for convenience; but he could not make a contract, nor do more than report opportunities to plaintiff in Philadelphia; he kept no books, paid no money, collected no accounts, and his own salary was paid from Philadelphia.

Not found as requested. I do find that the plaintiff corporation had a representative and an office in the City of New York. This representative solicited orders, incidentally negotiated in affairs there and used the said office; he could not make a contract nor do more than report opportunities to the plaintiff corporation in Philadelphia. He kept no general books of account, made no general payments, collected no accounts except for remittance and his own salary was paid from Philadelphia.

VIII. On or about August 17, 1905, in its said business the plaintiff entered into a certain contract in writing with the defendant, whereby the plaintiff agreed to provide such metal window

65 frames and sash and have the same delivered and put in place in the defendant's building numbers 247 to 259 West 54th Street, New York, and the defendant agreed to pay to the plaintiff therefor the sum of ten thousand three hundred forty-four dollars ($10,344.).

Not found otherwise than in original Finding of Fact numbered Three.

IX. Said contract was signed by plaintiff at Philadelphia and there mailed by it direct to defendant at New York.

Not found as requested. I do find that the contract was dated August 17, 1905; was executed by the plaintiff corporation in Philadelphia; was sent to the defendant by mail enclosed with a letter signed by the authorized representative in New York of the plaintiff corporation as follows:

Letter Head of David Lupton's Sons Co.

NEW YORK, U. S. A., *August* 26, '05.

Automobile Club of America.

Ernest Flagg, Archt., 35 Wall St., City.

DEAR SIR: Please find enclosed contracts in triplicate signed by us for the work on this bldg., which we trust you will find satisfactory.

Respectfully yours,

DAVID LUPTON'S SONS CO.
GEO. KABURECK.

Dict. G. K./J.

66 The contract was afterwards executed in New York by the defendant corporation and delivered to some one on behalf of the plaintiff in New York.

X. By the said contract it was further agreed that the said frames were to be set on or before November 15, 1905, and that said work was to be completed December 15, 1905, that should the plaintiff be obstructed or delayed in the prosecution or completion of its work by the act, neglect, delay or default of the defendant or its architect, or of any other contractor employed by the defendant upon the work, then the time therein fixed for the completion of the work should be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; that the defendant should provide all labor and materials not included in the said contract in such manner as not to delay the material progress of the work, and that in the event of its failure so to do, thereby causing loss to the plaintiff, it would reimburse the plaintiff for such loss.

Found as requested.

XI. The plaintiff began promptly to manufacture and furnish the frames and sash and to do the work under the said contract, and was able and willing to set the frames on or before November 15, 1905, and to complete the work December 15, 1905.

But the building was not sufficiently advanced so that the said frames could be set until the year 1906.

Found as requested.

XII. Defendant failed to provide the labor and materials required on the building and not included in the said contract, within
67 the time limited for plaintiff's part of the work, and in particular failed to erect the walls of the building to a sufficient height for the setting of the frames until after that time; and was not prepared to receive the sash and allow them to be hung and the work completed until after February 6, 1907.

Found as requested.

XIII. The defendant thereby delayed the material progress of the work and obstructed and delayed the plaintiff in its prosecution and completion.

No- found as requested. I do find that the delay in time of performance of the contract was waived by each party.

XIV. All of the frames and sash supplied by the plaintiff to the defendant under said contract were manufactured by the plaintiff at its factories in the State of Pennsylvania and thence transported to the State of New York after and pursuant to the said contract, and thereupon delivered to the defendant.

Found as requested.

XV. Before July 21, 1906, the plaintiff delivered all of the frames and a part of the sash required by the said contract and proceeded to put the same in place.

Found as requested.

XVI. In July, 1906, the plaintiff had manufactured in Philadelphia all the frames and sash required by said contract and had set a large number of the frames in the said building in New York. The work had been done to the satisfaction of the defendant's architect who gave his certificate for $6,867.90 and $5,837.72 was paid upon the contract price, being 85 per cent. of the certificate, but the defendant has failed and refused to make any further payment.

Found as requested.

68 XVII. In July, 1906, while plaintiff was engaged in the work of setting said frames in place, a certain Labor Union made objection to the said frames and sash on the ground that they had not been made in New York or at least east of the Hackensack River by its own members, and a certain Employers' Association supported it in such objections.

Found as requested.

XVIII. Said Labor Union was known as Local No. 11 of Sheet-metal Workers and said Employers' Association was a combination of building employers in New York City. Members of both were on a joint board or "committee," to which committee a "complaint" had been made against plaintiff on the grounds that its work (the making of the said frames and sash) was done outside of New York and that its shop was non-union.

Found as requested.

XIX. On or about July 21, 1906, when the plaintiff was engaged in putting in place the frames mentioned in said contract and had put in place about 305 out of the whole number of 326, the defendant, on account of said objections of said "committee" or of said Labor Union, supported by said Employers' Association, required the plaintiff to withdraw its workmen from said building.

Not found as requested. I do find that on or about July 12th, 1906, when the plaintiff was engaged in putting in place the frames mentioned in said contract and had put in place about 305 out of the whole number of 326, a strike occurred in the building, and all the other persons employed by the defendant in construction of this building ceased work on account of the character and con-

69 dition of labor employed by the plaintiff and material furnished by it, as complained of by the Union mentioned, and the architect of the defendant did on or about the 21st day of July, 1906, insist that the plaintiff withdraw its men from the building unless such complaint should be so adjusted that the strike should be called off and work resumed by the other mechanics in the building.

XIX*a*. At the same time defendant's architect said that defendant would have the remaining 21 frames set by other persons and would finish the building as far as it could (in the other trades) and let plaintiff set the sash afterward.

I so find, but with the addition that the unfinished portion of the plaintiff's contract for setting the frames involved more than the mere putting of 21 frames in place and that the proposition that the plaintiff should set the sash afterwards, was on the condition that such action should not prevent satisfactory completion of the building in other respects.

XX. At the same time, on or about July 21, 1906, the defendant demanded that the plaintiff come to some agreement with the said Labor Union and satisfy its said objections, and, upon its refusing to do so, the defendant had the remaining 21 frames set by the Manhattan Fireproof Door Company—work for which the defendant claims to have paid $709.28, being a part of the offset it claims.

Found as requested with the addition that the Manhattan Fireproof Door Company did more work which was included in the plaintiff's contract than the mere setting of 21 frames.

70 XX*a*. The reasonable cost of setting such frames at that time was not to exceed the sum of $1.50 each.

Not found as requested. I do find that if the plaintiff could have continued the work with its own men the cost of setting frames at that time to it, would not have exceeded $1.50 for each.

XXI. The plaintiff was at all times ready and willing to complete the work specified in said contract if allowed to use the sash which it had manufactured and to employ workmen of the kind it had heretofore employed and without satisfying the said Labor Union or acceding to its demands.

Found as requested.

XXII. On or about February 6, 1907, the defendant again demanded that the plaintiff satisfy the said objections of the said labor union, and, upon its refusing to do so, the defendant, against the plaintiff's protest, employed the said Manhattan Fireproof Door Company to hang the said sash.

Found as requested.

XXIII. The action of the defendant in having said work done by the Manhattan Fireproof Door Company was taken on the demand of contractors on other parts of the building and in order to induce said other contractors to continue with their work and complete the building.

Found as requested.

XXIV. The Manhattan Fireproof Door Company, which was employed by the defendant to do said work was a competitor in business of the plaintiff and so far as appears was a party to the action of the Trade Combinations in forcing the plaintiff from the said building. The principal officer of the Manhattan Fireproof

71 Door Company was a member of the Board which approved and effectually sustained the demand of the Labor Union against the plaintiff.

Found as requested, with the addition that the Manhattan Fireproof Door Company was the only contractor who could be found to complete this contract.

XXV. The only objection taken to the character of the material furnished by the plaintiff under the said contract and the only way in which it is claimed to have conflicted with plaintiff's or any other trade or to have interfered with the building operations, is that it was manufactured in Philadelphia and not by members of the New York union or combination and was not satisfactory to that union or to the Employers' Association.

Not found as requested. I do find that the only objection to the character of the material furnished was that the labor employed caused a strike and cessation of work on the building.

XXVI. The only objection taken to the labor supplied by the plaintiff under the said contract, and the only way in which it is claimed to have conflicted with plaintiff's or any other trade, or to have interfered with the building operations, is that it was not satisfactory to the said New York labor union or to the said Employers' Association.

Found as requested.

XXVII. There is no evidence that the laborers employed by the plaintiff engaged in any conflict of any kind with others employed upon the said building, or did anything to interfere with the work, or conducted themselves at any time otherwise than as peaceable, industrious and well behaved citizens.

Found as requested.

72 XXVIII. Under said requirement of the defendant the plaintiff withdrew its workmen from the building, and awaited permission to resume work, as promised by defendant as stated in Finding XIX*a*.

Found as requested.

XXIX. Plaintiff's work under the contract was stopped and plaintiff excluded from the building and prevented from completing its work by the act of defendant.

I decline to find this except as found heretofore.

XXX. Up to the time when plaintiff was so stopped and excluded it had fully and faithfully performed its contract.

Not found as requested. I do find that except as causing this labor trouble, the work done by the plaintiff was according to the contract.

XXXI. The work done by plaintiff under said contract was skilful and efficient and the materials furnished by it were sufficient and of good quality.

Found as requested.

XXXII. The plaintiff at all times until its exclusion, supplied and thereafter was ready and willing to supply a sufficient number of properly skilled workmen for the prosecution and completion of the work under the said contract.

Found as requested.

XXXIII. Neither the plaintiff nor any of its agents or employés did anything to cause any strike.

I cannot so find.

XXXIV. Neither the plaintiff nor any of its agents, or employés, were responsible for the strike alleged to have occurred in July, 1906.

I cannot so find.

XXXV. There was no strike or cessation of work at de-
73 fendant's building caused by the character or condition of labor employed or materials furnished by plaintiff.

I cannot so find.

XXXVI. There was no strike among any of the workmen on defendant's building in February, 1907.

Found with the addition that a renewal of the strike was threatened by the other mechanics if plaintiff was allowed to resume work.

XXXVII. Up to the time when plaintiff was so stopped and excluded no complaint had been made by defendant as to the character or quality of plaintiff's work or materials or of any delay in doing its work under the contract.

Found as requested.

XXXVIII. The just and reasonable cost of the work and materials specified in the contract and not yet done and supplied when plaintiff stopped in July, 1906, did not exceed $780.

Refused.

XXXIX. The just and reasonable cost of the work and materials specified in the contract and not yet done and supplied when plaintiff stopped in July, 1906, did not exceed $1,000.

I cannot find this. I do find that if the plaintiff had not gotten into trouble with the Unions, and had been able to complete the contract with its own experienced employees, the contract could have been completed with the material furnished by the plaintiff, for a sum not to exceed $1,000.

XL. Thereafter and on or about February 6, 1907, the defendant notified the plaintiff that it would not allow the plaintiff to hang the sash which were not yet hung when plaintiff was removed.

I find this with the addition that the plaintiff was still in
74 the conflict with the Unions.

XLI. On or about February 6, 1907, the defendant notified the plaintiff that the defendant would have the sash hung by another contractor.

Found as requested.

XLII. The plaintiff thereupon duly protested against such action.

I find that the plaintiff did protest.

XLIII. The plaintiff was ready and willing then and at all times to hang the said sash, and made timely offers to do so.

I find this subject to the preceding findings.

XLIV. Thereafter at the request of the defendant the plaintiff delivered to the defendant the remainder of the sash required by the said contract, and the defendant against the plaintiff's protest had them set by another contractor, the Manhattan Fireproof Door Company.

Found as requested.

XLV. Thereafter and before July 18, 1907, at the defendant's request, the plaintiff supplied under said contract a small amount of hardware, not exceeding $125, in value and remedied certain small defects, all to the satisfaction of the architect employed as the agent of the defendant, and thereby completed the work required by the said contract.

Found as requested with the addition that the work done by the plaintiff was after the work had been done by the Manhattan Fireproof Door Company, for which the defendant claims to have paid that Company.

XLVI. Before July 18, 1907, the plaintiff supplied all the frames and sash and provided all the other materials (the said hardware) required by the said contract.

75 Found as requested, except as to some articles of small value which were supplied by the Manhattan Fireproof Door Company and for which that Company was paid.

XLVII. Before July 18, 1907, the plaintiff did all the work required by the said contract and duly performed all the conditions of the said contract on its part, except insofar as such performance was delayed by the defendant and rendered in part impossible by the acts of the defendant, as hereinabove stated.

Found as requested with the additional exception of the work done by the Manhattan Fireproof Door Company.

XLVIII. All of the said frames and sash and materials were furnished, and all the said work done by the plaintiff was done, to the satisfaction of the architect employed as the agent of the defendant.

Found as requested.

XLIX. Said Manhattan Fireproof Door Company was a member of the Employers' Association, a combination of building employers in New York City, and was represented in its dealing with defendant by its president, one Norman, who was also a member of a certain "Committee" composed of members of said Employers' Association and members of certain trade-unions, including "Local No. 11," a trade-union of sheet-metal workers; and said Committee directly required of defendant, and accomplished, the removal of plaintiff and its men from defendant's building for the reason that plaintiff's shop in Philadelphia was an "open" shop and that the frames and sash were made west of the Hackensack River—"in the enemy's country" one of defendant's witnesses said.

Found as requested.

76 L. There was no other reason for the removal of plaintiff or its men.

I find that the sole reason for the removal of the plaintiff and its men was the fact that on account of the character and condition of the labor employed and material furnished by the plaintiff a strike was caused and all the other work on the building ceased.

LI. Said Norman was present by request of defendant's architect at a meeting of plaintiff and defendant on February 6, 1907, called by defendant's architect, at which meeting defendant, by its said architect, refused to permit plaintiff to complete its contract, whereupon said Norman proposed to do the work required to complete the contract for $2900; plaintiff protested against this proposal and objected to the amount as excessive; $900. of said amount was estimated as an allowance for "unionizing" the sash furnished by plaintiff; and plaintiff protested against such an allowance.

I find this with the exception of the last clause. I do not find that "$900, of said amount was estimated as an allowance for "unionizing" the sash furnished by plaintiff".

LII. Defendant gave the contract to said Manhattan Fireproof Door Company without advertisement and without competition except "estimates" alleged to have been received by defendant's architect but which estimates said architect could not or did not further specify or describe either as to their amounts or the names of the persons who made them.

I refuse to find this. I do find that the contract with the
77 Manhattan Fireproof Door Company was made without advertisement in newspapers, but after diligent effort to procure the lowest bidder who would undertake the work.

LIII. A part of the work done by said Manhattan Fireproof Door Company and included in defendant's alleged offset consisted in so-called "unionizing" of the sash, that is, in taking them apart and immediately soldering them together again, with the avowed purpose of having "union" work on them and of charging the cost of this "unionizing" upon plaintiff.

I do not find this.

LIV. The said frames and sash were delivered to defendant in good condition, they remained in defendant's possession many months before they were put in place, and a part of the charges made by defendant in its alleged offset against plaintiff are due to alleged work done in repairing and readjusting the frames and sash because of their alleged bad condition.

Found as requested.

LV. No complaint was made to plaintiff of any defects in frames or sash until after they were handled and after the sash were "unionized" by the said Manhattan Fireproof Door Company's "union" employees.

I do not find this.

LVI. The work done by said Manhattan Fireproof Door Company was the setting of window frames in the walls, the hanging of sash, "the unionizing" of the sash, and the repairing, alteration and refitting of frames and sash.

I do not find this. I do find that the work done by the Manhattan Fireproof Door Company was the completion of the contract of the plaintiff.

78 LVII. Upon the evidence, including the bills of the Manhattan Fireproof Door Company paid by defendant, it is not practicable to determine the extent or necessity of any of the different parts of the work done by it or the fair value thereof, excepting only the setting of the 21 frames left unset by plaintiff.

I do not find this. I do find that the bills paid to the Manhattan Fireproof Door Company by the defendant were almost exclusively for labor. The rates charged were the prevailing rates for that kind of labor at the time. There is nothing in the evidence to show that this amount of labor was necessary except the testimony of the foreman on the work who have testified that all of the labor charged for was necessary to complete this contract.

LVIII. After plaintiff's work was stopped as aforesaid in July 1906, and after said Manhattan Fireproof Door Company had done work provided for in plaintiff's contract plaintiff was recalled by

defendant for the purpose, as alleged by defendant, of completing its contract, and plaintiff did thereupon return to the building and do certain work and supply certain materials.

Found as requested.

LIX. When plaintiff thus returned and did the work under the contract its shop was still at Philadelphia and still an "open" shop.

Found as requested, with the addition that this was after the building was in other respects completed.

LX. When plaintiff was stopped in July 1906, defendant promised that any allowance to be made for the setting of the frames
79 not yet set and for the setting of the sash was to be adjusted to the satisfaction of both defendant's architect and plaintiff. Such allowance was never adjusted to the satisfaction of plaintiff.

I do not find this. I do find that the allowance was left to be adjusted by the architect, and that his adjustment was not satisfactory to the plaintiff.

LXI. The reasonable value of the frames, sash and materials required by the said contract was at least nine thousand three hundred and forty-four dollars.

I find this, with the proviso that the frames and sash could have been put into the building at a cost not to exceed $1,000.

LXII. The reasonable value of the labor required by the said contract after the shipping of the frames and sash was not more than one thousand dollars.

I do not find this. I do find that if the plaintiff had been able to perform this labor with its trained employees, the cost of that labor would not have exceeded $1,000 to the plaintiff.

LXIII. The cost to plaintiff of completing the work required by the contract, remaining to be done when plaintiff was stopped, if it were allowed to do so, using such workmen as it had theretofore employed on the building, would not have exceeded $1,000.

Found as requested.

LXIV. At the expiration of thirty days after all of the material was supplied and work done under the said contract as hereinabove stated the plaintiff duly requested the defendant's architect to give his certificate in writing that he approved the said materials and work and that the final payment was due to the plaintiff.

Found as requested.

LXIV*a*. The said Architect thereupon wrongfully and by
80 collusion with the defendant neglected and failed to give such a certificate.

I do not find this. I do find that the architect never gave any certificate as requested.

LXV. Of the said sum agreed to be paid under said contract the defendant has failed and refused to pay to the plaintiff the sum of four thousand five hundred six and 28/100 dollars ($4,506.28) or any part thereof, although payment of the same has been duly demanded.

I do not find this; I do find that the defendant has made no payments under the contract with the plaintiff except as found in the original report herein.

LXVI. Upon the trial of this action in opposition to defendant's motion to dismiss the complaint at the close of the evidence the plaintiff's counsel maintained that said Statute of the State of New York does not bar this suit as to a foreign corporation; it does not bar this action for several reasons:

A. It is not shown that the plaintiff was doing business within this State within the meaning of this Statute.

B. It does not appear that the contract in suit was made in this State.

C. The Statute has no reference to suits in the Federal Court, and cannot affect the jurisdiction of such Court.

D. The transactions upon which the suit is brought were transactions of commerce between the State of Pennsylvania and the State of New York.

E. The Statute of the State of New York with reference to foreign corporations should not be construed to apply to transaction of interstate commerce.

81 F. If that Statute be construed as affecting the transactions involved in this suit, it is contrary to the Constitution of the United States, and especially that clause of the Constitution which gives to the Congress alone the power to regulate commerce between the States.

And the plaintiff with respect to the Statutes of the State of New York, referred to thereupon claimed the protection and advantage of the Constitution of the United States relating to commerce between the States, and moved for judgment in its favor against the defendant for the amount claimed in the complaint.

Found as requested.

82 The following are the additional Conclusions of Law proposed by the plaintiff and my action upon them.

I. At the time of the making of the contract in question plaintiff was not doing business within the State of New York within the meaning of the law.

Refused.

II. Neither the making of the contract nor the performance of it by plaintiff was doing business within the meaning of the statute of New York.

Refused.

III. In the making and performance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

Refused.

IV. In making and performing the contract the plaintiff was within the protection of Article I, Section 8, subdivision 3, of the Constitution of the United States.

Refused.

V. The transaction constituting the cause of action herein were commerce between the states within the meaning of the Constitution of the United States, and as such are protected thereby from State regulation.

Refused.

VI. The failure of plaintiff to obtain the certificate provided for by Section 15 of the General Corporation Law of New York does not subject it to the penalties thereof, nor prevent it from maintaining suit in this Court.

Refused.

VII. The action of the defendant in putting another contractor in plaintiff's place without plaintiff's consent was a violation of plaintiff's rights.

Refused.

83 VIII. Defendant has failed to establish any lawful or just ground for an offset against plaintiff's claim.

Refused.

IX. The work done in "unionizing" the sash and in repairing and fitting the frames and sash cannot lawfully be charged against plaintiff.

Refused.

X. The burden is on defendant to establish a just and reasonable cost, and the necessity of any work done by it and charged against plaintiff.

I so find.

XI. Defendant has not established the just and reasonable cost nor the necessity, of all the work done after the plaintiff was removed nor of all the work charged by it against plaintiff.

Refused.

XII. Defendant has failed to establish that the payments made by it for work done by the Manhattan Fireproof Door Company and charged to plaintiff were reasonable and necessary.

Refused.

XIII. Defendant has not established that plaintiff was responsible for any defects in the frames and sash requiring any repairs or alterations.

Refused.

XIV. Plaintiff is entitled to judgment against defendant.

Refused.

84 XV. Plaintiff is entitled to judgment against the defendant for the sum of Three thousand seven hundred dollars with interest from August 18, 1907, and the costs of this action.

Refused.

All of which is respectfully submitted.

Dated New York City, July 1, 1909.

EDMUND COFFIN, *Referee.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul. 13, 1909, John A. Shields, Clerk.

85 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Affidavit and Order.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

William Ford Upson being duly sworn, says:

I am one of the attorneys for the plaintiff in the above entitled action now pending in this court and have been in special charge of the proceedings therein. This action was tried before Edmund Coffin, Esquire, Referee, who made a report in favor of the defendant, finding that the complaint should be dismissed with costs. This report was by the order of this Court made June 9, 1909, recommitted to the said Referee and on or about July 13, 1909, a report was filed by the said Referee making additional findings. In some haste and in my absence from the city there have been filed by my firm on behalf of the plaintiff, exceptions to the Referee's findings and conclusions, and on examining the same we now find some of them unnecessary and some of them not so specific and detailed as we should wish. We therefore ask on behalf of the plaintiff, permission to file the annexed amended exceptions. Judgment has not yet been entered upon the said report but notice has been given on behalf of the plaintiff of a motion therefor returnable
86 on the 27th inst. No previous application has been made for permission to file amended exceptions.

WM. FORD UPSON.

Sworn to before me this 22d day of July, 1909.
[SEAL.]
SARAH E. SINNIGAR,
Notary Public, Kings County.

Certificate filed in New York County.

On the foregoing affidavit permission is granted to file the annexed amended exceptions.

Dated, New York, July —, 1909.

E. H. LACOMBE,
U. S. Circuit Judge.

87 *Plaintiff's Amended Exceptions.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Plaintiff's Amended Exceptions.

The plaintiff hereby objects and excepts to the Findings of Fact and Conclusions of Law contained in the original report of the Referee, Edmund Coffin, Esq., before whom this cause was tried, as follows:

1. The plaintiff excepts to the finding of the said Referee (No. 3 in said original findings) that the said contract was made in the State of New York.

2. The plaintiff excepts to the finding of the said Referee (No. 6) that at the time of entering into said contract and for some time prior thereto the plaintiff was doing business within the State of New York within the meaning of Section 15 of the General Corporation Law of the State of New York.

3. The plaintiff excepts to the finding of the said Referee (No. 8) that the plaintiff had been doing business within the State of New York prior to and at the time of entering into the contract with the defendant without having procured a certification from the Secretary of the State of New York, as required by Section 15 of the General Corporation Law of the said State.

4. The plaintiff excepts to the finding of the said Referee (No. 9) that the plaintiff failed to set at least 21 of the frames which it was to set under the terms of its said contract with the defendant.

5. The plaintiff excepts to the finding of the said Referee (No. 10) that the plaintiff failed and neglected to hang all the
88 sash to be hung by it under its said contract with the defendant.

6. The plaintiff excepts to the finding of the said Referee (No. 13) that on or about the 3rd day of July, 1906, a strike occurred upon the building of the defendant upon which the plaintiff was at work, and the men of all the trades employed upon said building, except the men who were employed and working for the plaintiff, left the building.

7. The plaintiff excepts to the finding of the said Referee (No. 14) that the said strike occurred and all the other trades left the building because of the character of the labor employed and materials furnished by the plaintiff.

8. The plaintiff excepts to the finding of the said Referee (No. 15) that the plaintiff failed, refused and neglected to furnish labor that would not conflict with its own or other trades in the execution of the building operations of the defendant.

9. The plaintiff excepts to the finding of the said Referee (No.

16) that the defendant duly notified the plaintiff of said strike and that it should proceed with its work.

10. The plaintiff excepts to the finding of the said Referee (No. 17) that the defendant duly notified the plaintiff that it should furnish labor and supply material which would not conflict with its own or any other trade or interfere with the proper and uninterrupted execution of the building operations.

11. The plaintiff excepts to the finding of the said Referee (No. 18) that plaintiff continued and has at all times continued to fail, refuse and neglect to provide suitable labor that would not conflict with the other trades in the execution of the building operations of the defendant and to proceed with its work.

89 12. The plaintiff excepts to the finding of the said Referee (No. 20) that the defendant expended in completing the work covered by the plaintiff's contract with the defendant, so far as the same was completed by the defendant, the sum of $3,796.76.

13. The plaintiff excepts to the finding of the said Referee (No. 21) that the defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by plaintiff.

14. The plaintiff excepts to the finding of the said Referee (No. 23) that the difference between the amount unpaid upon the contract and the expense to the defendant of doing the work left undone by the plaintiff is the sum of $709.52.

The plaintiff further objects and excepts to the Findings of Fact and to the refusals to make Findings of Fact as requested by plaintiff, as reported by the said Referee under the order of June 9, 1909, as follows:

15. The plaintiff excepts to the refusal of said Referee to find upon plaintiff's request XIII, that the defendant thereby delayed the material progress of the work and obstructed and delayed the plaintiff in its prosecution and completion.

16. The plaintiff excepts to the refusal of said Referee to find, upon plaintiff's request XIX*a*, that the unfinished portion of the plaintiff's contract for setting the frames involved more than the mere putting of 21 frames in place.

17. The plaintiff excepts to the finding of said Referee, under plaintiff's request XX, that the Manhattan Fireproof Door Company did more work which was included in the plaintiff's contract than the mere setting of 21 frames.

90 18. The plaintiff excepts to the finding of said Referee, under plaintiff's request XXV, that the labor employed by the plaintiff caused a strike and cessation of work on the building.

19. The plaintiff excepts to the finding of said Referee, under plaintiff's request L, that on account of the character and condition of the labor employed and material furnished by the plaintiff a strike was caused and all the other work on the building ceased.

20. The plaintiff excepts to the finding of said Referee, under plaintiff's request LX, that when plaintiff was stopped in July, 1906, any allowance to be made for the setting of the frames not yet set and for the setting of the sash was left to be adjusted by the architect.

And the plaintiff further objects and excepts to the Findings and Conclusions of Law reported by the said Referee at the close of the trial as aforesaid, as follows:

21. Plaintiff excepts to the conclusion of the said Referee that the plaintiff has violated a statute of the State of New York, to wit, the General Corporation Law of said State.

22. Plaintiff excepts to the conclusion of the said Referee that the contract sued on was procured in violation of a statute of said State and was void and unenforcible by the plaintiff.

23. Plaintiff excepts to the conclusion of the said Referee that the plaintiff cannot maintain an action upon said contract.

24. Plaintiff excepts to the conclusion of the said Referee that the plaintiff has failed to make out a cause of action against the defendant.

25. Plaintiff excepts to the conclusion of the said Referee that upon the plaintiff's failure to proceed with the work and to
91 perform its said contract, the defendant was justified in completing the same on its own account and charging the balance thereof to the plaintiff.

26. The plaintiff excepts to the conclusion of the said Referee that defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by the plaintiff.

27. The plaintiff excepts to the conclusion of the said Referee that the defendant has a counterclaim or set off in the sum of $3,796.76 and said amount should be allowed it and deducted from the sum due and owing to the plaintiff over and above the amount paid them on account of their contract with the defendant.

28. The plaintiff excepts to the conclusion of the said Referee that the complaint herein should be dismissed.

And plaintiff further objects and excepts to the said Referee's refusals to find certain additional Conclusions of Law proposed by the plaintiff as shown in said report made by the said Referee under the said order of June 9, 1909, as follows:

29. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request I, to find that at the time of the making of the contract in question plaintiff was not doing business within the State of New York within the meaning of the law.

30. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request II, to find that neither the making of the contract nor the performance of it by plaintiff was doing business within the meaning of the statute of New York.

31. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request III, to find that in the making and per-
92 formance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

32. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request IV, to find that in making and performing the contract the plaintiff was within the protection of Article 1, Section 8, subdivision 3, of the Constitution of the United States.

33. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request V, to find that the transactions constituting the

cause of action herein were commerce between the states within the meaning of the Constitution of the United States, and as such are protected thereby from State regulation.

34. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request VI, to find that the failure of plaintiff to obtain the certificate provided for by Section 15 of the General Corporation Law of New York does not subject it to the penalties thereof, nor prevent it from maintaining suit in this Court.

35. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request VII, to find that the action of the defendant in putting another contractor in plaintiff's place without plaintiff's consent was a violation of plaintiff's rights.

36. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request VIII, to find that defendant has failed to establish any lawful or just ground for an offset against plaintiff's claim.

37. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request IX, to find that the work done in "unionizing" the sash and in repairing and fitting the frames and sash cannot
93 lawfully be charged against plaintiff.

38. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request XI, to find that defendant has not established the just and reasonable cost, nor the necessity, of all the work done after the plaintiff was removed nor of all the work charged by it against plaintiff.

39. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request XII, to find that defendant has failed to establish that the payments made by it for work done by the Manhattan Fireproof Door Company and charged to plaintiff were reasonable and necessary.

40. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request XIII, to find that defendant has not established that plaintiff was responsible for any defects in the frames and sash requiring any repairs or alterations.

41. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request XIV, to find that plaintiff is entitled to judgment against defendant.

42. The plaintiff excepts to the refusal of the said Referee, upon plaintiff's request XV, to find that plaintiff is entitled to judgment against the defendant for the sum of three thousand seven hundred dollars with interest from August 18, 1907, and the costs of this action.

43. And the plaintiff excepts to the denial by the said Referee of plaintiff's motion for judgment in favor of plaintiff against the defendant.

Dated, New York, June 22, 1909.

SCOTT, UPSON & NEWCOMB,
Plaintiff's Attorneys, 27 *William Street*,
Manhattan Boro., New York City.

WM. FORD UPSON, *Of Counsel.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 26, 1909. John A. Shields, Clerk.

94 *Defendant's Exceptions.*

United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

The defendant hereby excepts to the ruling of Edmund Coffin, Esq., Referee, upon the plaintiff's proposed Findings of Fact and Conclusions of Law, and to each and every ruling made by the said Referee thereon upon the ground that the said Referee was without power to rule thereupon, his jurisdiction and powers having terminated upon the rendition and filing of his report on the 20th day of May, 1909.

N. Y., July 21st, 1909.

Yours, etc.,

NILES & JOHNSON,
Attorneys for Defendant, No. 11 Wall Street, Manhattan Borough, New York City.

To Messrs. Scott, Upson & Newcomb, Plaintiff's Attorneys, and Hon. John A. Shields, Clerk.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 21, 1909. John A. Shields, Clerk.

[Endorsed:] Copy. Notice of Exceptions.

95 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

I, Edmund Coffin, the Referee appointed by this Court to hear and determine the issues in the above entitled action, do hereby certify that in the attendance upon the hearings in this action and in considering the matter and determining the same and making my report thereon, and my rulings upon the findings herein, I have necessarily occupied upon the business of this reference fifty hours.

Dated New York, N. Y., 3rd August, 1909.

EDMUND COFFIN, *Referee.*

96 STATE OF NEW YORK,
County of New York, ss:

William W. Niles being duly affirmed says: I am a member of the firm of Niles & Johnson, attorneys for the defendant in the above entitled action and reside in the Borough of the Bronx, City of New York.

The disbursements above set out have been necessarily incurred

by the defendant in this action and the copies of papers charged for were actually and necessarily used on the trial of this action, and the witnesses above named each attended as a witness before the Referee upon the trial of this action the number of days set opposite to his respective name, and travelled the number of miles in going from and returning to his residence which is set opposite to his respective name.

This case was tried before Edmund Coffin to hear and determine the issues under a stipulation between the attorneys for the respective parties upon which the Court entered an order referring this cause. Hearings were had before the Referee from the 20th of January, 1909, until the 19th of March, 1909. A large amount of testimony was taken before the said Referee both on behalf of the plaintiff and on behalf of the defendant, the typewritten transcript of said testimony occupying 600 typewritten pages and a great amount of documentary evidence was produced before the said Referee.

The parties to this action entered into the following stipulation before the Referee prior to the opening of this case: That the fees of the Referee be fixed at the sum of $5.00 an hour for all time necessarily spent by him in hearings and in the considering and making up of his report, which are to be paid by the attorney
97 for the prevailing party and taxed as costs. They further stipulated for the employment of a stenographer who was to transcribe three copies of the record and to be paid thirty-five cents a folio for his services by the prevailing party which amount was also to be taxed.

The Referee has certified that he necessarily occupied in the hearings in this matter and in the preparation of his report and in passing upon the findings, fifty hours. This was prior to the time when the report was re-committed to him for his further action thereon. It therefore appears that the Referee has made a proper charge under the stipulation for his services herein.

The record covers 600 pages and the stenographer's charge for the same and for attendance upon adjournments is the sum of $387.90, which seems to be a smaller charge than he would be entitled to under the stipulation of the parties.

That the fees charged for the witnesses herein were actually paid them except the witnesses Flagg, Morris and Niles whose fees defendant waives.

W. W. NILES.

Affirmed to before me this 4th day of August, 1909.

RALPH Q. KELLY,
Comm'r of Deeds, City of New York.

98 At a Stated Term of the United States Circuit Court for the Southern District of New York held in United States Court and Post Office Building, in the Boro of Manhattan, City of New York, on the 9th day of August, 1909.

Present: Honorable E. Henry Lacombe, Judge.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Order for Judgment.

This cause having been reached upon the calendar of this court, and the parties hereto by their respective attorneys having consented in writing that the issues be referred to Edmund Coffin, Esq., counsellor-at-law, to hear and determine the same, and an order having been entered on the 7th day of January, 1909, referring the issues herein to Edmund Coffin, Esq., as Referee to hear and determine the same, and the parties having appeared before the said Referee, the plaintiff by Scott, Upson & Newcomb, its attorneys, William Forse Scott and William Ford Upson as counsel, and the defendant by Niles & Johnson, its attorneys, William W. Niles as counsel, and the Referee having taken the oath of office and having heard the allegations and proofs of the parties, and after due deliberation having duly made his decision together with a statement of the facts found and conclusions of law thereon, his conclusion being that the complaint herein should be dismissed with costs, and the said report, findings and conclusions of law having been duly filed on the 20th day of May 1909, and notice of filing having been duly served on plaintiff's attorneys on that date, and the plaintiff having moved to recommit the said report to the said Referee with permission
99 to submit proposed findings of fact and conclusions of law, and the court having duly made and entered an order on the 9th day of June, 1909, which order was re-settled by order entered on the 22nd day of June, 1909, recommitting said report to said Referee with such permission, and plaintiff having submitted proposed findings of fact and conclusions of law to said Referee, and the Referee having ruled thereupon and returned his report together with said proposed findings and his rulings thereupon on the 13th day of July, 1909, and the plaintiff having duly excepted to certain of the rulings, findings and conclusions of said Referee as appears by plaintiff's amended exceptions duly filed on or about July 26, 1909; and the plaintiff presenting said exceptions to this court on the hearing of this motion and thereupon moving the court to reject the said report of the Referee, and the court declining to consider the said exceptions or any of them, to which ruling as to each of said exceptions the plaintiff duly excepts,

Now on motion of Niles & Johnson, attorneys for defendant, after hearing William W. Niles, Esq., of counsel for the defendant, and William Ford Upson, Esq., of counsel for the plaintiff in opposition, it is

Ordered, that judgment of this court is directed to be entered according to the report of the said Referee, and due exception by the plaintiff to said direction is hereby noted.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Aug. 9, 1909, John A. Shields, Clerk.

100 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Judgment.

This cause having been reached upon the calendar of this court, and the parties hereto by their respective attorneys having consented in writing that the issues be referred to Edmund Coffin, Esq., counsellor-at-law, to hear and determine the same, and an order having been entered on the 7th day of January, 1909, referring the issues herein to Edmund Coffin, Esq., as Referee to hear and determine the same, and the parties having appeared before the said Referee, the plaintiff by Scott, Upson & Newcomb, its attorneys, William Forse Scott and William Ford Upson as counsel, and the defendant by Niles & Johnson, its attorneys, William W. Niles as counsel, and the Referee having taken the oath of office and having heard the allegations and proofs of the parties, and after due deliberation having duly made his decision together with a statement of the facts and conclusions of law thereon, and his conclusion being that the complaint herein should be dismissed with costs, and the said report, findings and conclusions of law having been duly filed on the 20th day of May, 1909, and notice of filing having been duly served on plaintiff's attorneys on that date, and the plaintiff having moved to recommit the said report to the said Referee with permission to submit proposed findings of fact and conclusions of law, and the court having duly made and entered an order on the 9th day of June 1909,

101 which order was resettled by order entered on the 22nd day of June, 1909, recommitting said report to said Referee with such permission, and defendant having duly excepted thereto and the plaintiff having submitted proposed findings of fact and conclusions of law to said Referee, and the Referee having ruled thereupon and returned his report together with said proposed findings and his rulings thereupon on the 13th day of July, 1909, and the defendant having duly excepted to the rulings of said Referee upon said proposed findings, and the plaintiff having duly excepted to certain of the rulings, findings and conclusions of said Referee, as appeared by its amended exceptions filed July 26, 1909, and this court directing judgment according to said report, to which direction the plaintiff duly excepted; and the defendant's costs having been duly adjusted at $733.50/100.

Now on motion of Niles & Johnson, attorneys for defendant, after hearing William W. Niles, Esq., of counsel for the defendant and William Ford Upson of counsel for the plaintiff, in opposition, it is

Adjudged that the complaint of David Lupton's Sons Company, the plaintiff herein, be dismissed on the merits, and that the defendant, The Automobile Club of America, recover of the plaintiff David Lupton's Sons Company seven hundred thirty-three and 50/100 dollars, costs of this action, and that the defendant have execution.

Judgment signed and entered this 9th day of August, 1909.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The within form of judgment is proposed by plaintiff. Copy received Aug. 4, 1909. Niles & Johnson, Def't's Att'vs. U. S. Circuit Court, Southern District, N. Y. Filed Aug. 9, 1909, John A. Shields, Clerk.

102 United States Circuit Court, Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Assignment of Errors.

The above named plaintiff says that there was, and is, manifest error in the judgment, record, and proceedings in the above entitled action, upon which it will rely for the prosecution of its writ of error:

I. In that the Court declined to consider the objections and exceptions filed by the plaintiff to the rulings, findings and conclusions of the Referee, as appears by plaintiff's amended exceptions duly filed on or about July 26, 1909, or any of the said objections or exceptions.

II. In that the Court denied plaintiff's motion to reject the report of the said Referee.

III. In that the Court directed judgment against the plaintiff witihout acting upon the report of the Referee.

IV. In that the Referee and the Court found that the contract in suit was made in the State of New York.

V. In that the Referee and the Court found that at the time of entering into said contract and for some time prior thereto the plaintiff was doing business within the State of New York within the meaning of Section 15 of the General Corporation Law of the State of New York.

103 VI. In that the Referee and the Court found that the plaintiff failed to set some of the frames which it was to set under the terms of its said contract with the defendant.

VII. In that the Referee and the Court found that the plaintiff failed and neglected to hang some of the sash to be hung by it under its contract with the defendant.

VIII. In that the Referee and the Court found that a strike oc-

curred and all the other trades left the building because of the character of the labor employed and materials furnished by the plaintiff.

IX. In that the Referee and the Court found that the plaintiff failed, refused and neglected to furnish labor that would not conflict with its own or other trades in the execution of the building operations of the defendant.

X. In that the Referee and the Court found that the defendant duly notified the plaintiff of the said strike and that it should proceed with its work.

XI. In that the Referee and the Court found that the defendant duly notified the plaintiff that it should furnish labor and supply material which would not conflict with its own or other trades or interfere with the proper and uninterrupted execution of the building operations.

XII. In that the Referee and the Court found that the defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by the plaintiff.

XIII. In that the Referee and the Court found that the labor employed by the plaintiff caused a strike and cessation of the work on the building.

XIV. In that the Referee and the Court found that on account of the character and condition of the labor employed and
104 material furnished by the plaintiff a strike was caused and all the other work on the building ceased.

XV. In that the Referee and the Court found that when plaintiff was stopped in July, 1906, any allowance to be made for the setting of the frames not yet set and for the hanging of the sash was left to be adjusted by the architect.

XVI. In that the Referee and the Court found and concluded that the plaintiff violated a statute of the State of New York, to wit, the General Corporation Law of said State.

XVII. In that the Referee and the Court found and concluded that the contract sued on was procured in violation of a statute of said State and was void and unenforcible by the plaintiff.

XVIII. In that the Referee and the Court found and concluded that the plaintiff cannot maintain an action upon said contract.

XIX. In that the Referee and the Court found and concluded that the plaintiff failed to make out a cause of action against the defendant.

XX. In that the Referee and the Court found and concluded that the defendant was justified in completing the work on its own account and charging the balance thereof to the plaintiff.

XXI. In that the Referee and the Court found and concluded that defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by the plaintiff.

XXII. In that the Referee and the Court found and concluded that the defendant has a counterclaim or set off in the sum of $3,796.76 and said amount should be allowed it and deducted
105 from the sum due and owing to the plaintiff over and above the amount paid it on account of its contract with the defendant.

XXIV. In that the Referee and the Court found and concluded that the complaint herein should be dismissed.

XXV. In that the Referee and the Court refused to find and conclude that at the time of the making of the contract in suit plaintiff was not doing business within the State of New York within the meaning of the law.

XXVI. In that the Referee and the Court refused to find and conclude that neither the making of the contract nor the performance of it by plaintiff was doing business within the State of New York within the meaning of the statute of New York.

XXVII. In that the Referee and the Court refused to find and conclude that in the making and performance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

XXVIII. In that the Referee and the Court refused to find and conclude that in making and performing the contract the plaintiff was within the protection of Article 1, Section 8, subdivision 3, of the Constitution of the United States.

XXIX. In that the Referee and the Court refused to find and conclude that the transactions constituting the cause of action herein were commerce between the states within the meaning of the Constitution of the United States, and as such protected thereby from State regulation.

XXX. In that the Referee and the Court refused to find and conclude that the failure of plaintiff to secure the certificate provided for by Section 15, of the General Corporation Law of New
106 York does not prevent it from maintaining suit in this Court.

XXXI. In that the Referee and the Court refused to find and conclude that Section 15, of the General Corporation Law of the State of New York is contrary to the Constitution of the United States.

XXXII. In that the Referee and the Court refused to find and conclude that the action of the defendant in putting another contractor in plaintiff's place without plaintiff's consent was a violation of plaintiff's rights.

XXXIII. In that the Referee and the Court refused to find and conclude that defendant has failed to establish any lawful or just ground for offset against plaintiff's claim.

XXXIV. In that the Referee and the Court refused to find and conclude that the work done in "unionizing" the sash and in repairing and fitting the frames and sash cannot lawfully be charged against plaintiff.

XXXV. In that the Referee and the Court refused to find and conclude that defendant has not established the just and reasonable cost, nor the necessity, of the work done after the plaintiff was removed, nor of the work charged by it against plaintiff.

XXXVI. In that the Referee and the Court refused to find and conclude that defendant has failed to establish that the payments made by it for work done by the Manhattan Fireproof Door Company and charged to plaintiff were reasonable and necessary.

XXXVII. In that the Referee and the Court refused to find and conclude that defendant has not established that plaintiff was re-

sponsible for any defects in the frames and sash requiring any repairs or alterations.

107 XXXVIII. In that the Referee and the Court refused to find and conclude that plaintiff is entitled to judgment against defendant.

XXXIX. In that the Referee and the Court refused to find and conclude that plaintiff is entitled to judgment against the defendant for the sum of three thousand seven hundred dollars with interest from August 18, 1907, and the costs of this action.

XL. In that the Referee and the Court denied plaintiff's motion for judgment in favor of plaintiff against the defendant.

XLI. In that the Court gave judgment against the plaintiff.

Wherefore the plaintiff prays that the judgment of the said Circuit Court may be reversed and a new trial ordered, or that judgment may be directed in favor of the plaintiff.

Dated, New York, August 18, 1909.

SCOTT, UPSON & NEWCOMB,
Attorneys for Plaintiff, 27 *William Street*,
Manhattan Boro., New York City.

WM. FORSE SCOTT,
WM. FORD UPSON,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Aug. 19, 1909. John A. Shields, Clerk.

108 Circuit Court of the United States for the Southern District of New York.

DAVID LUPTON'S SONS COMPANY, Plaintiff,
against
THE AUTOMOBILE CLUB OF AMERICA, Defendant.

Know all men by these presents, that we, David Lupton's Sons Company, as principal, and National Surety Company, a corporation under the laws of the State of New York, as surety, are held and firmly bound unto the Automobile Club of America, the defendant above named, in the sum of Fifteen hundred ($1500.00) Dollars, to be paid to the said The Automobile Club of America, for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 13th day of August, 1909.

Whereas, the above named Plaintiff, David Lupton's Sons Company, has sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled case by the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named David Lupton's Sons Company shall prosecute

said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] DAVID LUPTON'S SONS COMPANY,
By EDWARD LUPTON, *Pres.*
NATIONAL SURETY COMPANY,
By JOEL RATHBONE, [SEAL.]
Vice President.

C. T. WILKINSON, *Sec'y.*

Attest:
WM. A. THOMPSON,
Assistant Secretary.

109 STATE OF NEW YORK,
County of New York, ss:

On the 16th day of August, 1909, before me personally came E. T. Wilkinson to me known, who being by me duly sworn did depose and say, that he resides in Phila.; that he is the Secretary of the David Lupton's Sons Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

E. T. WILKINSON. [SEAL.]

[SEAL.] GEORGE E. POTTS,
Notary Public.

Commission expires Jan. 21, 1911.

110 *Affidavit, Acknowledgement, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 13th day of August, one thousand nine hundred and nine before me personally came Joel Rathbone, known to me to be the Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of David Lupton's Sons Co. vs. The Automobile Club of America, as a surety thereon, and who, being by me duly sworn, did dispose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of David Lupton's Sons Co. vs. The Automobile Club of America is the corporate seal of said National Surety Company, and

was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Vice-President of said Company, and that he is acquainted with Wm. A. Thompson and knows him to be the Assistant Secretary of said Company; and that the signature of said Wm. A. Thompson subscribed to said Bond is in the genuine handwriting of said Wm. A. Thompson, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of two million dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this bond is given.

JOEL RATHBONE.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 13th day of August, 1909.

[SEAL.] WM. F. GAYNOR,
(Officer's Signature, description and seal.)
Notary Public for County of Kings, Certificate filed in New York, Queens, Richmond, and Westchester Counties.

111 Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.

H. G. WARD,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District N. Y. Filed Aug. 19, 1909. John A. Shields, Clerk.

111½ By the Honorable Henry Galbraith Ward, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To the Automobile Club of America, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court, to be holden at the City of Washington in the District of Columbia, on the 16th day of September, 1909, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein David Lupton's Sons Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 19th

day of August, in the year of our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States the One Hundred and Thirty-fourth.

H. G. WARD,

Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

112 [Endorsed:] E. & A. 2968. Law 1—168. Supreme Court of the United States. David Lupton's Sons Company, Plaintiff in Error, against The Automobile Club of America, Defendant in Error. Citation. William Forse Scott, William Ford Upson, Attorneys for Plaintiff in Error, 27 William Street, Manhattan Boro., New York City. Due service of a copy of within citation is admitted this 20th day of August, 1909. Niles & Johnson, Attorneys for Defendant in Error. U. S. Circuit Court, Southern District N. Y. Filed Aug. 23, 1909. John A. Shields, Clerk.

113 [Endorsed:] Supreme Court of the United States. David Lupton's Sons Company, Pl'ff in Error, vs. The Automobile Club of America, Def't in Error.

Endorsed on cover: File No. 21,840. S. New York C. C. U. S. Term No. 137. David Lupton's Sons Company, plaintiff in error, vs. The Automobile Club of America. Filed September 27th, 1909. File No. 21,840.

Supreme Court of the United States.

October Term, 1911.
No. 137.

DAVID LUPTON'S SONS COMPANY,
Plaintiff in Error,

against

THE AUTOMOBILE CLUB OF AMERICA,
Defendant in Error.

MOTION TO DISMISS OR AFFIRM
AND
DEFENDANT'S BRIEF.

WILLIAM W. NILES,
Counsel for Defendant in Error.

Notice of Bringing on Motion for Hearing.

United States Supreme Court.

DAVID LUPTON'S SONS COMPANY,
Plaintiff in Error,

vs.

THE AUTOMOBILE CLUB OF AMERICA,
Defendant in Error.

To

SCOTT, UPSON & NEWCOMB, Esqs.,
Attorneys for Plaintiff in Error.

SIRS:

PLEASE TAKE NOTICE that on Monday, the 16th day of October, 1911, at the opening of the United States Supreme Court, at Washington, D. C., or as soon thereafter as counsel can be heard, the motions of which the annexed are copies, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief on argument to be submitted with said motion in support thereof.

Dated, New York, September 11th, 1911.

WM. W. NILES,
Counsel for the Defendant in Error.

Motion.

THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911. No. 137.

DAVID LUPTON'S SONS COMPANY,
Plaintiff in Error,

AGAINST

THE AUTOMOBILE CLUB OF AMERICA,
Defendant in Error.

Comes now the Defendant in Error by his counsel appearing in that behalf and moves the Court to dismiss the Writ of Error herein, for the following reasons:

1. That the judgment entered herein on the decision and report of the Referee is not reviewable.

2. That the alleged errors assigned herein do not raise any issue which would give this honorable Court jurisdiction to review the judgment herein entered.

3. That the Transcript of Record contains no Bill of Exceptions, and thus fails to show what questions were raised on the trial of the action before the Referee, and fails to show that any question which would give this Court jurisdiction was an issue on the trial.

4. That the alleged errors assigned cannot be reviewed without a Bill of Exceptions, and no such bill was ever prepared, allowed, settled or filed.

5. That practically all alleged errors assigned relate to the findings of fact, which the Court will not review.

6. That all the alleged errors on rulings of law that the Court might possibly review are immaterial in view of the findings by the Referee of all material facts affecting the merits in favor of

the defendant, and in view of said Referee's finding that the plaintiff had substantially failed to carry out its contract and had broken its contract.

7. And the defendant in error by its counsel aforesaid also moves the Court to affirm said judgment or decree from which the writ of error is taken, because even if the record in said cause may show that this Court has any jurisdiction, yet the errors that the Court might possibly review are immaterial in view of the findings by the Referee of all the material facts in favor of the defendant, and in view of the Referee's finding that the plaintiff had failed to prove a cause of action on the facts, so that it is manifest that the writ was taken frivolously and for delay only.

Dated August 31st, 1911.

W. W. Niles,
Counsel for defendant in error,
for the purpose of these
motions.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911. No. 137.

DAVID LUPTON'S SONS COMPANY,
Plaintiff in Error,

AGAINST

THE AUTOMOBILE CLUB OF AMERICA,
Defendant in Error.

PLAINTIFF'S BRIEF.

Defendant makes its motion to dismiss a writ of error taken from a judgment entered on the report of the decision of a referee in an action at law, and defendant also moves to affirm the judgment. The order of reference is at page 15 of the printed record.

The motion which is printed herewith sets out the grounds thereof, and the points in this brief will follow in the order of the grounds set out in the motion.

POINT I.

The judgment entered herein on the report of the Referee is not reviewable.

In York & Cumberland R. R. *vs.* Myers, 18 How. 252, there was a stipulated reference to three persons to be appointed by the Court whose report was to be made and judgment entered. After judgment was entered the cause was taken to the Supreme Court by writ of error. The Supreme Court looked upon the proceedings as an arbitration and said:

"This conclusion of his is a final decision on the question, " for this Court cannot revise his mistakes either of law or " fact, if such had been established."

York & Cumberland R. R. *vs.* Myers, 18 How. 253.

This Referee was to hear and *determine* (Printed Record, p. 15). He was *not* to hear and report findings to the Court.

There is no provision in the United States law for a reference in common law cases. It has been held that trials must be had as provided for by the United States laws, that is, in common law cases, by a jury in order to be reviewable by this Court.

Campbell *vs.* Boyreau, 21 How. 223.

To avoid the ruling in the above case provision was made by the law for the review of actions tried by the *Court* without a jury (Act of 1865, Chapter 86; Revised Stats., Sec. 649).

When tried by the Court without a jury the statute must be strictly complied with in order to make the decision reviewable.

Kearney *v.* Case, 12 Wall. 275.

POINT II.

The alleged errors assigned herein do not raise any issue which would give this honorable Court jurisdiction to review the judgment herein entered.

The assignment of errors is contained at page 54 of the printed transcript of record. In the various alleged errors assigned it nowhere appears that the jurisdiction of the Court was an issue. Neither does it appear that the construction or application of the Constitution of the United States, nor the constitutionality of any law of the United States was involved, nor was any statute or law of the State claimed to be in contravention of the Constitution of the United States, nor was any other issue reviewable in this court directly raised.

No such error was "separately and particularly set out" as required by Rule 35.

The first error assigned is omnibus, and it is impossible to know what is referred to as long as no bill of exceptions is in the record. The errors assigned, commencing with XXV on page 56 and continuing to and including XXXIX on page 59, all relate to refusals of the Referee to find certain facts and make certain conclusions.

The Supreme Court will not review alleged errors in the refusal of the Court to find facts requested.

Shipman *vs.* Straitville Mining Co., 158 U. S. 361.

Insurance Company *vs.* Folsom, 18 Wall. 237—top p. 250.

POINT III.

The transcript of record contains no bill of exceptions, and thus fails to show what questions were raised on the trial of the action before the Referee, and fails to show that any question which would give this Court jurisdiction was in issue in the court below.

Where an issue is tried by the Court without the intervention of the jury the only rulings reviewable in the Supreme Court are rulings "in the progress of the trial of the cause if excepted to at the time and duly presented by bill of exceptions."

Revised Statutes, Sec. 700.

Insurance Company *vs.* Folsom, 18 Wall. 237; see pp. 249, 250.

In order to give this Court jurisdiction it should appear that some question reviewable in the Supreme Court was decided on the trial of the issues and exception to the decision thereon taken during the trial. That such ruling was made and exception taken does not appear in the transcript of record for there is no bill of exceptions.

The so-called exceptions were filed by the plaintiff in error *after* the Referee had rendered his decision, and therefore cannot be presumed to have been considered on the trial. It is the exceptions taken "in the progress of the trial of the cause" which are reviewable by the United States Supreme Court.

Revised Statutes, Sec. 700.

Even in the State practice of New York, the questions presented on appeal must have been raised in the court below in order to be reviewable. None of the so-called exceptions filed by the plaintiff in error raise any question which could give this honorable Court jurisdiction to review, particularly so as this Court will not review errors alleged to have been made by the refusal of this Court to make requested findings.

Shipman *v.* Straitville Mining Co., 158 U. S. 361.
Insurance Co. *vs.* Folson, 18 Wall. 237, see p. 250.

The Referee has found as a fact that the plaintiff failed to perform its contract. (Printed Transcript, p. 29, Findings 11, 15, 18, 21, and p. 30, Conclusions of Law numbered V, VI and VII.)

This failure of the plaintiff to show performance of its contract is fatal to its cause of action. Even if the Court had power to and were disposed to review these findings of fact, how can it do so if there is no bill of exceptions in the case?

POINT IV.

The alleged errors assigned cannot be reviewed without a bill of exceptions, and no such bill was ever prepared, allowed, settled or filed.

Section 700 of the Revised Statutes providing for trial of an issue of fact in a civil case in the Circuit Court, by the Court and without intervention of a jury, limits the review of any questions on the trial, and provides as follows:

"The rulings of the Court in progress of a trial of a cause, "IF excepted to at the time *and duly presented by a bill of* "*exceptions*, may be reviewed by the Supreme Court upon a "writ of error or upon appeal."

Insurance Co. *v.* Folsom, 18 Wall. p. 249.

Whatever rulings the plaintiff in error seeks to review are not in this case presented by any bill of exceptions, and the defendant in error has not brought himself within the provisions of the law allowing a review in such cases. If there is any review to be taken by the Supreme Court on a reference at law, the practice therein should be analogous to that on a trial by the Court without a jury. In this case there is no bill of exceptions, and nothing in the record to show that any Supreme Court question was brought before the Referee.

Whatever so-called exceptions were filed after the trial before the Referee are not reviewable for they do not in any way pretend to be a "Bill of Exceptions." Besides the Court is limited to the review of rulings during the trial of a cause to those *excepted* to during *the trial* and duly presented by a bill of exceptions (Revised Statutes, Section 700). These so-called exceptions were filed *after* the Referee's decision was filed.

POINT V.

Practically all alleged errors assigned relate to the findings of fact, which the Court will not review.

A reading of the alleged errors assigned fully bears out this point.

POINT VI.

All the alleged errors on rulings of law that the Court might possibly review are immaterial in view of the finding by the Referee of all material facts affecting the merits in favor of the defendant, and in view of said Referee's finding that the plaintiff had substantially failed to carry out its contract and had broken its contract.

The writ of error from the Supreme Court brings up not merely any question which is necessary in order to give the Supreme Court jurisdiction, but it also brings up the entire case, and where the cause is properly disposed of on the merits, the Supreme Court will not consider the particular question on which its jurisdiction depends where it is unnecessary for it to do so.

Holder *vs.* Aultman, 169 U. S. 81.

"It is not the habit of the Court to decide questions of con-
" stitutional nature unless absolutely necessary to the decision
" of the case."

Burton *vs.* U. S., 196 U. S. 283-295.

No question of a constitutional or jurisdictional nature can in any wise affect the Referee's decision where he has found the plaintiff has broken its contract, and has failed to perform its contract (Printed Transcript, p. 29, Findings 11, 15, 18, 21, and p. 30, Conclusions V, VI and VII).

POINT VII.

The motion of the defendant in error to affirm the judgment should be granted.

All the material facts as to the making of the contract and the breach thereof by the plaintiff herein in its failure to perform same were found in favor of the defendant. These this honorable Court will not review.

Revised Statutes, Sec. 1011.

It is immaterial so far as judgment is concerned whether the contract was valid or invalid, void or voidable, or in contravention of the laws of New York, or against public policy. The plaintiff in error breached its contract and failed to perform it, and therefore is not entitled to recover even if the contract were absolutely and unquestionably valid and binding.

This fact must have been apparent to the defendant in error. The appeal is, therefore, without merit and its only purpose can be delay.

Respectfully submitted,

WILLIAM W. NILES,
Counsel for Defendant in Error.

Supreme Court of the United States

October Term, 19[illegible]

No. [illegible]

DAVID LUPTON'S SONS COMPANY,

Plaintiff in Error,

vs.

THE AUTOMOBILE CLUB OF AMERICA.

BRIEF FOR PLAINTIFF-IN-ERROR.

Betts, [illegible] & Newcomb,
Attorneys for Plaintiff-in-Error,
27 William Street,
New York.

Wm. [illegible],
Wm. [illegible],
Of Counsel.

Supreme Court of the United States

October Term, 1911. No. 137.

DAVID LUPTON'S SONS COMPANY,
Plaintiff-in-Error,

vs.

THE AUTOMOBILE CLUB OF AMERICA.

BRIEF FOR PLAINTIFF-IN-ERROR

Statement of the Case

This action was brought in the United States Circuit Court for the Southern District of New York, by David Lupton's Sons Company, a Pennsylvania corporation, against The Automobile Club of America, a New York corporation, to recover five thousand dollars, with interest, for breach of contract.

Plaintiff had a factory in Philadelphia, where it manufactured metal window-frames and sash, and the contract in suit was for furnishing such frames and sash, and putting them in place in defendant's club house in New York.

The defenses upon which the complaint was dismissed and judgment rendered against plaintiff were, that plaintiff, a foreign corporation which had not obtained authority to do business within the State of New York, under a statute of that

State, was not entitled to maintain any action upon the contract (page 9), and that defendant rightfully excluded it from the building and prevented it from completing its work because a labor union objected to its products and threatened a strike upon other work in the building if it was allowed to continue.

The New York practice does not require or allow a reply to such defenses (page 33, "IV").

New York Code of Civil Procedure:

> "§514. Reply; what to contain. Where the "answer contains a counterclaim, the plaintiff, "if he does not demur, may reply to the "counterclaim."
>
> "§522. * * * But an allegation of new mat-"ter in the answer, to which a reply is not re-"quired, or of new matter in a reply, is to be "*deemed controverted by the adverse party,* "*by traverse or avoidance, as the case requires.*"

By order of the Circuit Court, entered upon written consent of the attorneys for both parties, trial was had before a Referee "to hear and determine he issues" (page 15); the Referee made detailed findings of fact and conclusions of law (pages 26 to 30); his report was recommitted by order of the Court (page 32) for additional findings, which he thereupon made (pages 33 to 44); and plaintiff filed exceptions (pages 46 to 49).

Upon defendant's motion for judgment, plaintiff presented its exceptions and moved the Court to reject the report of the Referee, but the Court declined to consider the exceptions or any of them, to which ruling plaintiff excepted, and the Court

directed judgment according to the report of the Referee (pages 52-53).

Judgment was entered accordingly (pages 53-54), dismissing the complaint on the merits, with costs.

The Referee found the following facts relating to the jurisdiction of the Court and plaintiff's prima facie right to recover:

Plaintiff is, and at all times mentioned in the complaint was, a business stock corporation other than a moneyed corporation, under the laws of the State of Pennsylvania; and defendant is, and at all times was, a corporation, under the laws of the State of New York (page 26, "1" and "2"; page 33, "I" and "II").

On or about August 17, 1905, in the City of New York, defendant entered into a written contract with plaintiff, whereby plaintiff agreed to manufacture and place in position upon the premises of defendant in New York City, metal window-frames and sash necessary for the building to be erected by defendant upon said premises, and to provide all the materials and perform all the work necessary in connection therewith, for the sum of $10,344.00 (page 26, "3"); the frames were to be set on or before November 15, 1905, and the work was to be completed December 15, 1905; if plaintiff should be obstructed or delayed in the prosecution or completion of its work by the act, neglect, delay or default of defendant or its architect, or of any other contractor employed by defendant upon the work, then the time fixed for the completion

of the work was to be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; defendant was to provide all labor and materials not included in the said contract in such manner as not to delay the material progress of the work, and in the event of its failure so to do, thereby causing loss to plaintiff, it was to reimburse plaintiff for such loss (page 35, "X").

Plaintiff began promptly to manufacture and furnish the frames and sash and to do the work under the said contract, and was able and willing to set the frames on or before November 15, 1905, and to complete the work December 15, 1905, but defendant failed to provide the labor and materials required on the building and not included in the contract, within the time limited for plaintiff's part of the work, and in particular failed to erect the walls of the building to a sufficient height for the setting of the frames until after that time; and was not prepared to receive the sash and allow them to be hung and the work completed until after February 6, 1907 (page 35, "XII"), and the delay in time of performance of the contract was waived (page 35, "XIII").

Before the date last mentioned plaintiff had manufactured and delivered to defendant all of the frames and sash, but under circumstances hereinafter stated it had been interrupted and it was then finally excluded by defendant, which employed another contractor to put in place the few remaining frames and to hang the sash (page 29, "19"; pages 36-37, "XV" to "XX"; page 39, "XL" to "XLIV").

Thereafter and before July 18, 1907, at defendant's request, plaintiff supplied a small amount of

hardware, not exceeding $125.00 in value, and remedied certain small defects, all to the satisfaction of the architect employed as the agent of defendant, and thereby completed the work required by the contract (pages 39-40, "XLV" to "XLVIII" and page 41, "LVIII").

The work done by plaintiff under the contract was skillful and efficient, the materials furnished by it were sufficient and of good quality (page 38, "XXXI"), and plaintiff at all times until its exclusion supplied, and thereafter was ready and willing to supply, a sufficient number of properly skilled workmen for the prosecution and completion of the work under the contract (page 38, "XXXII").

The reasonable value of the frames, sash and materials required by the contract was at least $9,344.00 and the cost of the labor, if plaintiff had been able to perform it with its trained employees, would not have exceeded $1,000 to plaintiff (page 42, "LXI" and "LXII").

In July, 1906, defendant paid $5,837.72 upon the contract price, but it has failed and refused to make any further payment (page 36, "XVI"), thus leaving unpaid the sum of $4,506.28.

As to the defense under the New York statute, the Referee found the following facts:

At the time of entering into the contract, the General Corporation Law of the State of New York, being Chapter 563 of the laws of 1890, as amended to that date, provided among other things as follows:

"Section 15. Certificate of authority of a "foreign corporation. No foreign stock corpora- "tion, other than a moneyed corporation, shall "do business in this state without having first "procured from the Secetary of State a certi- "ficate that it has complied with all the re- "quirements of law to authorize it to do busi- "ness in this state, and that the business of the "corporation to be carried on in this state is "such as may be lawfully carried on by a cor- "poration incorporated under the laws of this "state for such or similar business, or if more "than one kind of business, by two or more "corporations so incorporated for such kinds "of business respectively. The Secretary of "State shall deliver such certificate to every "such corporation so complying with the re- "quirements of law. No such corporation now "doing business in this state shall do business "herein after December thirty-first, eighteen "hundred and ninety-two, without having pro- "cured such certificate from the Secretary "of State, but any lawful contract pre- "viously made by the corporation may be "performed and enforced within the state "subsequent to such date. No foreign "stock corporation doing business in this "state shall maintain any action in this state "upon any contract made by it in this state un- "less prior to the making of such contract it "shall have procured such certificate. This pro- "hibition shall also apply to any assignee of "such foreign stock corporation and to any per- "son claiming under such assignee or such for- "eign stock corporation or under either of them.

"No certificate of authority shall be granted to "any foreign corporation having the same name "as an existing domestic corporation, or a name "so nearly resembling it as to be calculated to "deceive, nor to any foreign corporation, other "than a moneyed or insurance corporation, "with the word 'trust,' 'bank,' 'banking,' 'in-"surance,' 'indemnity,' 'guaranty,' 'savings,' " 'investment,' 'loan,' or 'benefit,' as a part of "its name."

"SECTION 16. Proof to be filed before grant-"ing certificate. Before granting such certifi-"cate the Secretary of State shall require every "such foreign corporation to file in his office a "sworn copy in the English language of its "charter or certificate of incorporation and a "statement under its corporate seal particu-"larly setting forth the business or objects of "the corporation which it is engaged in carry-"ing on or which it proposes to carry on within "the State, and a place within the State which "is to be its principal place of business, and des-"ignating in the manner prescribed in the Code "of Civil Procedure a person upon whom pro-"cess against the corporation may be served "within the State. The person so designated "must have an office or place of business at the "place where such corporation is to have its "principal place of business within the State. "Such designation shall continue in force un-"til revoked by an instrument in writing desig-"nating in like manner some other person upon "whom process against the corporation may be "served in this State. If the person so desig-"nated dies or removes from the place where

"the corporation has its principal place of busi-
"ness within the State, and the corporation
"does not within thirty days after such death
"or removal designate in like manner another
"person upon whom process against it may be
"served within the State, the Secretary of State
"may revoke the authority of the corporation
"to do business within the State, and process
"against the corporation in an action upon any
"liability incurred within this State before
"such revocation, may, after such death or re-
"moval, and before another designation is
"made, be served upon the Secretary of State.
"At the time of such service the plaintiff shall
"pay to the Secretary of State Two dollars, to
"be included in his taxable costs and disburse-
"ments and the Secretary of State shall forth-
"with mail a copy of such notice to such corpo-
"ration if its address or the address of any of-
"ficer thereof is known to him" (pages 27-28, "4").

In order to obtain a certificate of authority to do business within the State of New York under Section 15 of the General Corporation Act of said State, it was necessary at the time in question herein to pay to the Secretary of State a fee of $10 and to the State Treasurer a franchise tax (page 33, "III").

The provision for franchise tax referred to by the Referee was as follows:

"181. License tax on foreign corporations.
"Every foreign corporation, except banking
"corporations, fire, marine, casualty and life
"insurance companies, co-operative fraternal

"insurance companies, and building and loan "associations, authorized to do business un- "der the general corporation law, shall pay to "the State Treasurer, for the use of the State, "a license fee of one-eighth of one per centum "for the privilege of exercising its corporate "franchises or carrying on its business in such "corporate or organized capacity in this State "to be computed upon the basis of the capital "stock employed by it within this State, during "the first year of carrying on its business in "this State; and if any year thereafter any "such corporation shall employ an increased "amount of its capital stock within this State, "the same license fee shall be due and pay- "able upon any such increase. The tax im- "posed by this section on a corporation not "heretofore subject to its provisions shall be "paid on the first day of December, nineteen "hundred and one, to be computed upon the "basis of the amount of capital stock employed "by it within the State during the year pre- "ceding such date, unless on such date such cor- 'poration shall not have employed capital with- "in the State for a period of thirteen months "in which case it shall be paid within the time "otherwise provided by this section. No ac- "tion shall be maintained or recovery had in "any of the courts in this State by such for- "eign corporation without obtaining a receipt "for the license fee hereby imposed within thir- "teen months after beginning such business "within the State, or if at the time this sec- "tion takes effect such a corporation has been "engaged in business within this State for

"more than twelve months without obtaining "such receipt within thirty days after such tax "is due" (Section 181 of the Tax Law, as amended by L. 1901, Ch. 558).

According to the Code of Civil Procedure of the State of New York no reply was required or allowed to the defense founded upon Section 15 of the General Corporation Law of said State (page 33 "IV").

At the time of entering into the contract and for some time prior thereto, plaintiff was doing business within the State of New York, within the meaning of said Section 15 of the General Corporation Law of the State of New York, and it had not procured from the New York Secretary of State a certificate, as required by said section, prior to doing business in the State of New York, or prior to entering into the contract sued on herein (page 29, "6", "7" and "8").

The character of plaintiff's business, and of the transaction in suit, as interstate commerce, are found by the Referee as follows:

At all of said times plaintiff was engaged in the business of manufacturing metal window frames and sash at its factories in the State of Pennsylvania and selling the same and causing them to be transported to other States, including the State of New York, and to be there delivered and put in place in the buildings for which they were so manufactured (page 34, "V"). The cost or price of putting in place such frames and sash did

not exceed on the average, in the general business of plaintiff, 7½ per cent. of their value or price (page 34, "VI"). Plaintiff had a representative and an office in the City of New York. This representative solicited orders, incidentally negotiated in affairs there and used the said office; he could not make a contract nor do more than report opportunities to plaintiff in Philadelphia. He kept no general books of account, made no general payments, collected no accounts except for remittance, and his own salary was paid from Philadelphia (page 34, "VII"). All of the frames and sash supplied by plaintiff to defendant under the contract were manufactured by plaintiff at its factories in the State of Pennsylvania and thence transported to the State of New York after and pursuant to the said contract, and thereupon delivered to defendant (page 36, "XIV").

Upon the trial of this action, in opposition to defendant's motion to dismiss the complaint at the close of the evidence, plaintiff's counsel maintained that said statute of the State of New York does not bar this suit, for the following reasons:

The transactions upon which the suit is brought were transactions of commerce between the State of Pennsylvania and the State of New York.

If the statute be construed as affecting the transactions involved in this suit, it is contrary to the Constitution of the United States, and especially that clause of the Constitution which gives to the Congress alone the power to regulate commerce between the States.

And plaintiff, with respect to the statute of the State of New York referred to, thereupon claimed the protection and advantage of the Constitution

of the United States relating to commerce between the States, and moved for judgment in its favor against defendant for the amount claimed in the complaint (page 43, "LXVI").

As to the exclusion of plaintiff from the building, and the defense of an alleged breach of contract on its part, the Referee found the following Facts:

The contract in suit provided, among other things, as follows:

"ART. VIII. The Owner agrees to provide all "labor and materials not included in this con- "tract in such manner as not to delay the ma- "terial progress of the work, and in the event "of failure so to do, thereby causing loss to "the Contractor, agrees that he will reimburse "the Contractor for such loss; and the Con- "tractor agrees that if he shall delay the ma- "terial progress of the work so as to cause any "damage for which the Owner shall become "liable (as above stated), or, in the event of "any strike or cessation of work, caused by "character or condition of labor employed or "material furnished, continuing for 8 days, "that the Owner shall have full authority to "arbitrate or adjust the matter and the con- "tractor shall make good to the Owner any "loss or damage caused. The amount of such "loss or damage to either party hereto shall, "in every case, be fixed and determined by the "Architect or by arbitration, as provided in "Art. III of this contract."

"ART. III. No alteration shall be made in

"the work shown or described by the drawings "and specifications, except upon a written or- "der of the Architect, and when so made, the "value of the work added or omitted shall be "computed by the Architect, on written notice "to each of the parties hereto, who shall also "be notified in writing of the amount so fixed, "and the amount so ascertained shall be added "to or deducted from the contract price. In "the case of dissent from such award by either "party hereto, the valuation of the work added "or omitted shall be referred to three (3) dis- "interested Arbitrators, one to be appointed "by each of the parties to this contract, and "the third by the two thus chosen; the decis- "ion of any two of whom shall be final and "binding, and each of the parties hereto shall "pay one-half of the expenses of such refer- "ence" (page 28, "5").

In general terms, the Referee finds that plaintiff failed to set a few of the frames and failed to hang all of the sash; that on or about July 3, 1906, a strike occurred upon the building of defendant upon which plaintiff was at work, and the men of all of the trades employed upon the building, except the men who were employed by and working for plaintiff, left the building because of the character of the labor employed and material furnished by plaintiff; that plaintiff refused to furnish different labor or material; that on or about July 21, 1906, defendant "under adjustment of Ernest Flagg as such architect" took possession of the premises and employed other persons to complete the work; necessarily expending therefor the sum of $3,796.-76, "certified by Ernest Flagg as architect," the dif-

ference between the amount thus paid and the amount unpaid upon the contract being $709.52 (pages 29-30, "9" to "21" and "23").

But, in response to plaintiff's requests for further findings of fact, he finds the following:

In July, 1906, while plaintiff was engaged in the work of setting the frames in place, a certain labor union made objections to the frames and sash on the ground that they had not been made in New York, or at least east of the Hackensack River, by its own members, and a certain employers' association supported it in such objections (page 36, "XVII"). Members of both were on a joint "committee" to which complaint had been made against plaintiff (page 36, "XVIII").

On or about July 12, 1906, when plaintiff was engaged in putting in place the frames mentioned in the contract and had put in place about 305 out of the whole number of 326, a strike occurred in the building, and all the other persons employed by defendant in construction of this building ceased work on account of the character and condition of labor employed by plaintiff and material furnished by it, as complained of by the union mentioned, and the architect of defendant did on or about the 21st day of July, 1906, insist that plaintiff withdraw its men from the building unless such complaint should be so adjusted that the strike should be called off and work resumed by the other mechanics in the building (page 36, "XIX").

At the same time, on or about July 21, 1906, defendant demanded that plaintiff come to some agreement with the labor-union and satisfy its objections, and, upon its refusing to do so, defendant had the remaining 21 frames set by the Manhattan

Fireproof Door Company—work for which defendant claims to have paid over $700, being a part of the offset it claims, although if plaintiff could have continued the work with its own men the cost of setting the frames would not have exceeded $1.50 for each or $31.50 for the 21. Plaintiff was at all times ready and willing to complete the work specified in the contract, if allowed to use the sash which it had manufactured and to employ workmen of the kind it had theretofore employed, and without satisfying the labor-union or acceding to its demands (page 37, "XIXa" to "XXI").

On or about February 6, 1907, defendant again demanded that plaintiff satisfy the objections of the labor-union, and, upon its refusing to do so, defendant, against plaintiff's protest, employed the Manhattan Fireproof Door Company to hang the sash (page 37, "XXII").

Said Manhattan Fireproof Door Company was a member of the Employers' Association, a combination of building employers in New York City, and was represented in its dealing with defendant by its president, who was also a member of the "committee" above mentioned, which required of defendant and accomplished the removal of plaintiff and its men from defendant's building for the reason that plaintiff's shop in Philadelphia was an "open" shop and that the frames and sash were made west of the Hackensack River—"in the enemy's country," one of defendant's witnesses said (page 40, "XLIX").

The only objection to the character of the material furnished was that the labor employed caused a strike and cessation of work on the building, and the only objection taken to the labor, and

the only way in which it is claimed to have conflicted with plaintiff's or any other trade or to have interfered with the building operations, is that it was not satisfactory to the New York labor-union or to the Employers' Association (page 38, "XXV" and "XXVI").

There is no evidence that the laborers employed by plaintiff engaged in any conflict of any kind with others employed upon the said building, or did anything to interfere with the work or conducted themselves at any time otherwise than as peaceable, industrious and well-behaved citizens (page 38, "XXVII").

"Except as causing this labor trouble," the work done by plaintiff was according to the contract (page 38, "XXX").

There was no strike among any of the workmen on defendant's building in February, 1907, but a renewal of the strike was threatened by the other mechanics if plaintiff was allowed to resume work (page 39, "XXXVI").

If plaintiff had been able to complete the contract with its own experienced employees, the contract could have been completed with the material furnished by plaintiff for a sum not to exceed $1,000.00 (page 39, "XXXIX") as against $3,800.00 paid to the Manhattan Fireproof Door Company!

The frames and sash were delivered to defendant in good condition; they remained in defendant's possession many months before they were put in place, and a part of the charges made by defendant in its alleged offset are for alleged work done in repairing and readjusting the frames and sash because of their alleged bad condition (page 41, "LIV").

From these facts the Referee drew the following conclusions of law:

I. That plaintiff has violated a statute of the State of New York, to wit, the General Corporation Law of said State.

II. That the contract sued on was procured in violation of the statute of said State and was void and unenforcible by plaintiff.

III. That plaintiff cannot maintain an action upon said contract.

IV. That plaintiff has failed to make out a cause of action against the defendant.

V. That upon plaintiff's failure to proceed with the work and to perform its said contract, the defendant was justified in completing the same on its own account and charging the balance thereof to plaintiff.

VI. That defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by plaintiff.

VII. That defendant has a counterclaim or set off in the sum of $3,796.76, and said amount should be allowed it and deducted from the sum, if any, due and owing to plaintiff over and above the amount paid them on account of their contract with defendant (page 30).

VIII. That the complaint herein should be dismissed with costs.

He refused each of the following conclusions of law requested by plaintiff:

III. In the making and performance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

IV. In making and performing the contract plaintiff was within the protection of Article I, Section 8, Subdivision 3, of the Constitution of the United States.

V. The transactions constituting the cause of action herein were commerce between the states within the meaning of the Constitution of the United States, and as such are protected thereby from State regulation.

VI. The failure of plaintiff to obtain the certificate provided for by Section 15 of the General Corporation Law of New York does not subject it to the penalties thereof, nor prevent it from maintaining suit in this Court.

VII. The action of defendant in putting another contractor in plaintiff's place without consent was a violation of plaintiff's rights.

VIII. Defendant has failed to establish any lawful or just ground for an offset against plaintiff's claim.

XIV. Plaintiff is entitled to judgment against defendant.

XV. Plaintiff is entitled to judgment against defendant for the sum of $3,700 with interest from August 18, 1907, and the costs of this action (pages 43, 44).

Plaintiff filed exceptions to each of the Referee's conclusions of law (page 48, "21", to "28") and to each of his refusals to find conclusions of law (pages 48-49, "29" to "36" and "41" to "43").

As stated, the Court declined to consider these exceptions or any of them, to which ruling plaintiff excepted, and the Court directed judgment according to the report of the Referee in an order reciting such ruling (pages 52-53), and judgment was entered accordingly, dismissing the complaint on the merits with costs, the judgment reciting plaintiff's exceptions (pages 53-54).

The errors relied upon are as follows:

I. In that the Court declined to consider the objections and exceptions filed by the plaintiff to the rulings, findings and conclusions of the Referee, as appears by plaintiff's amended exceptions duly filed on or about July 26, 1909, or any of the said objections or exceptions.

II. In that the Court denied plaintiff's motion to reject the report of the said Referee.

XVII. In that the Referee and the Court found and concluded that the contract sued on was procured in violation of a statute of said State and was void and unenforcible by plaintiff.

XVIII. In that the Referee and the Court found and concluded that plaintiff cannot maintain an action upon said contract.

XIX. In that the Referee and the Court found and concluded that plaintiff failed to make out a cause of action against defendant.

XX. In that the Referee and the Court found and concluded that defendant was justified in completing the work on its own account and charging the balance thereof to plaintiff.

XXI. In that the Referee and the Court found and concluded that defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by plaintiff.

XXII. In that the Referee and the Court found and concluded that defendant has a counterclaim or set off in the sum of $3,796.76, and said amount should be allowed it and deducted from the sum due and owing to plaintiff over and above the amount paid it on account of its contract with defendant.

XXIV. In that the Referee and the Court found and concluded that the complaint herein should be dismissed.

XXVII. In that the Referee and the Court refused to find and conclude that in the making and performance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

XXVIII. In that the Referee and the Court refused to find and conclude that in making and performing the contract plaintiff was within the protection of Article I, Section 8, Subdivision 3, of the Constitution of the United States.

XXIX. In that the Referee and the Court refused to find and conclude that the transactions constituting the cause of action herein were commerce between the States within the meaning of the Constitution of the United States, and as such protected thereby from State regulation.

XXX. In that the Referee and the Court refused to find and conclude that the failure of plaintiff to secure the certificate provided for by Section 15 of the General Corporation Law of New York does not prevent it from maintaining suit in this Court.

XXXI. In that the Referee and the Court refused to find and conclude that Section 15 of the General Corporation Law of the State of New York is contrary to the Constitution of the United States.

XXXII. In that the Referee and the Court refused to find and conclude that the action of defendant in putting another contractor in plaintiff's place without plaintiff's consent was a violation of plaintiff's rights.

XXXIII. In that the Referee and the Court refused to find and conclude that defendant has failed to establish any lawful or just ground for offset against plaintiff's claim.

XXXVIII. In that the Referee and the Court refused to find and conclude that plaintiff is entitled to judgment against defendant.

XXXIX. In that the Referee and the Court refused to find and conclude that plaintiff is entitled to judgment against defendant for the sum of $3,700.00, with interest from August 18, 1907, and the costs of this action.

XL. In that the Referee and the Court denied plaintiff's motion for judgment in favor of plaintiff against defendant.

XLI. In that the Court gave judgment against plaintiff.

(Assignments of errors, pages 54 to 57.)

ARGUMENT

POINT I

The judgment is reviewable.

The case of *Roberts vs. Benjamin, 124 U. S., 64, 67, 71-72,* is on all fours with the case at bar. It was an action at law brought in the Circuit Court for the Northern District of New York; upon written stipulation by the parties an order was entered by the Court that the action be referred "to determine the issues therein"; the Referee reported special findings of fact and conclusions of law, whereupon the Court, overruling a motion for a new trial, made an order directing "that judgment be entered herein, pursuant to the report of the Referee"; and Mr. Justice Blatchford giving the opinion of this Court said: "The only ques-"tions open to review here are whether there was "any error of law in the judgment rendered by the "Circuit Court upon the facts found by the Referee. "The judgment having been entered 'pursuant to "the report of the Referee,' the facts found by "him are conclusive in this Court," and this Court proceeded to review the Referee's conclusions of law, holding that "on the finding of fact the rule of damages applied to this case was in accordance with the authorities," and that, upon other findings of fact and omissions to find, the Referee's conclusion of law that the defendants had not established their counterclaim was correct.

In *Chicago, M. & St. P. R. Co. vs. Clark, 178 U. S., 353, 364,* the Circuit Court of Appeals for the Second Circuit had rendered a decision affirming a judgment on the report of a Referee. That judgment was reversed and judgment ordered in favor of the plaintiff with costs.

An examination of the record shows that the reference was to "hear and determine." Mr. Chief-Justice Fuller, delivering the opinion of this Court, said:

> "The record shows that the cause came on "before the district judge, holding the Circuit "Court, for trial, 'without a jury, and a trial "by jury having been expressly waived by the "written consent of the parties duly filed;' that "a referee was appointed by written consent in "accordance with the modes of procedure in "such cases in the courts of record of New "York, and with the rules of the Circuit Court; "and that his findings, rulings and decisions "were made those of the Court. Under those "circumstances the question whether the judg-"ment rendered was warranted by the facts "found was open for consideration in the Cir-"cuit Court of Appeals, and is so here, and that "is sufficient for the disposition of the case."

This case also is in principle, identical with the case at bar; in both a Referee was appointed by written consent, in accordance with the procedure in the state courts and with the rule of the Circuit Court. It is true that in the case at bar, as in the *Roberts* case above cited, there was no *express* statement that the findings of the Referee were made those of the Court, but in the case at bar

equally with the *Roberts* case, that is the substantial effect of the proceedings had. To hold otherwise would be to make of the Federal statute adopting the state practice, and of the rules of the Circuit Court, a trap for litigants. An express adoption of the Referee's findings by the Court below would be immaterial to the proceedings in the case, and to make such adoption a prerequisite to a review in this Court would make the right to review dependent upon the caprice of the judge and the mere form in which he has expressed his judgment, rather than upon its substance and legal effect.

Such appears to be the view of the Circuit Court of Appeals for the Second Circuit, as shown in *Bagley vs. Gen. Fire Ext. Co., 150 Fed., 284*, reviewing a judgment entered on the report of a Referee "to hear and determine." Examination of the record shows that the judgment was entered by the Clerk, without any order by the Court.

No mode of trial in a State court prevents this Court from reviewing constitutional questions by writ of error to such court, and we find, in principle or in statute, no reason why the result should be otherwise on writ of error to a Federal court.

POINT II

The assignments of errors bring up the question of the constitutionality of the statute of the State of New York excluding foreign corporations, as interpreted by the Referee and the Court, and this Court has jurisdiction.

The *Act of 1891, Section 5, 26 Stat. L., page 827*, gives jurisdiction on writ of error to the Circuit Court direct, "in any case in which * * * a law of a State is claimed to be in contravention of the Constitution of the United States."

The errors of the Court below in declining to consider plaintiff's objections and exceptions, or any of them, in denying the motion to reject the report, and in directing judgment, are specified in assignments of errors I and II, page 54. The errors of the Referee and of the Court in their conclusions of law that the State statute prevented the plaintiff from maintaining this action, are specified in assignments of errors, XVII, page 55; XXIV and XXX, page 56; and XXXVIII, page 57. Their errors in refusing to find that the transactions in suit were interstate commerce and therefore protected by the Federal Constitution, and that the statute referred to is unconstitutional, are specified in assignments of errors XXVII, XXVIII, XXIX and XXXI, page 56.

POINT III

Plaintiff's claim that the statute of the State of New York was in contravention of the Constitution of the United States sufficiently appears by the record.

The character of plaintiff's business in general and of the transactions sued upon, as interstate commerce, appear by its amended complaint (pages 4 to 6).

The statute referred to is set up as an affirmative defense in defendant's answer (page 9).

The New York practice does not require a reply to such a defense, but only to a counterclaim (*Code of Civil Procedure*, §514, *supra*), and provides (*id.*, §522, *supra*) that the same shall be "deemed controverted, by traverse or avoidance, as the case requires."

Under this provision all possible objections to the statute must be considered as made, and it is apparent that the judgment could not have been rendered without applying the statute and upholding its constitutionality.

Throughout the record it appears that plaintiff did claim that the statute was in contravention of the Federal Constitution, and that the main controversy in the case was over that claim. It appears in the Referee's opinion, findings and refusals to find, in the exceptions filed to his report, in the recitals of the order directing judgment, and in the judgment itself.

This was sufficient.

In *Loeb vs. Columbia*, 179 U. S., 472, 476 to 485, a case in which, as here, "the plaintiff could not

have raised in his petition any question of a Federal right," by anticipating the defence, such a question was raised by general demurrer, under which counsel claimed on the argument that a statute was unconstitutional. This Court upheld its jurisdiction, citing *Holder vs. Aultman, 169 U. S., 81, 88,* and other cases.

Certainly such a claim was made more formally and clearly in the case at bar.

POINT IV

A bill of exceptions is not required or appropriate for raising the points here sought to be reviewed.

Counsel for defendant in error, in quoting from *U. S. Rev. Stats., Section 700,* omits the following: "and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

In *Aetna Ins. Co. vs. Boon, 95 U. S., 117, 124,* Mr. Justice Strong, delivering the opinion of the Court, said:

> "No bill of exceptions is required, or is neces-
> "sary, to bring upon the record the findings,
> "whether general or special. They belong to
> "the record as fully as do the verdicts of a jury.
> "If the finding be special, it takes the place of
> "a special verdict; and, when judgment is en-
> "tered upon it, no bill of exceptions is needed
> "to bring the sufficiency of the finding up for re-
> "view. But there must be a finding of facts

"either general or special, in order to authorize "a judgment; and that finding must appear on "the record."

In *Walnut vs. Wade, 103 U. S., 683, 688-689,* Mr. Justice Woods, delivering the opinion of the Court, said:

"It is thus seen that the only use which can "be made of the bill of exceptions, when there "is a special finding of facts, is to present the "rulings of the Court *in the progress of the* "*trial*, upon questions of law."

POINT V

The business of plaintiff, and the transaction in suit, are interstate commerce and, as such, under the protection of the Federal Constitution.

The transaction in suit consisted essentially of the sale of articles manufactured in Pennsylvania, to be thence transported to New York, and there delivered to defendant.

Such transactions are clearly interstate commerce within the definitions fixed by the Supreme Court, and as such are protected.

Brown vs. Maryland, 12 Wheat., 419, 447, was a case of foreign commerce, but the opinion of the Court included in its consideration commerce among the several states, and Mr. Chief Justice Marshall said:

> "Sale is the object of importation * * * "it must be considered as a component part of "the power to regulate commerce. Congress "has a right, not only to authorize importa- "tion *but to authorize the importer to sell.*"

In *Cooper Manufacturing Co. vs. Ferguson, 113 U. S., 727, 734, 737*, Mr. Justice Woods, delivering the opinion of the Court, said:

> "It is clear that the (State) statute cannot "be construed to impose upon a foreign cor- "poration limitations of its right to make "contracts in the State for carrying on com- "merce between the States, for that would "make the act an invasion of the exclusive "right of Congress to regulate commerce "among the several States."

Therefore statutes and a State constitution requiring foreign corporations to file a certificate and have a place of business and agent in the State were held not to forbid a single transaction, namely, the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. The majority of the Court did not think it necessary to decide that the statute was unconstitutional, as thus interpreted, but Mr. Justice Matthews and Mr. Justice Blatchford concurred in the result on the ground that the statute was unconstitutional, because the State could not prohibit the corporation "from selling in Colorado, "by contracts made there, its machinery manu- "factured elsewhere, for that would be to regulate "commerce among the States."

In *Norfolk & Western R. Co. vs. Penn., 136 U. S., 114*, it was held, that a corporation engaged in interstate commerce cannot be required to pay a license fee for maintaining an office in the State.

If it be found that plaintiff has also done some local business, that does not affect its rights.

In *Crutcher vs. Kentucky, 141 U. S., 47, 59*, Mr. Justice Bradley, speaking for the Court, said:

> "We do not think that the difficulty is at all "obviated by the fact that the express com- "pany, as incidental to its main business "(which is to carry goods between different "States) does also some local business by "carrying goods from one point to another "within the State of Kentucky."

The fact that plaintiff did some work in putting the frames in place and hanging the sash in the frames does not deprive it of this protection.

In *Caldwell vs. North Car., 187 U. S., 622*, the plaintiff, on orders from customers, had shipped its goods to its agent, who had a room in a hotel where he unpacked the photographs and frames, put the former in the latter, and then delivered them to the customers. It was held that the business was interstate commerce, and could not be regulated or subjected to a license fee.

In *Milan Milling Co. vs. Gorten, 93 Tenn., 590*, it was held that a contract to manufacture,

deliver and put in position certain machinery was interstate commerce.

In *Black-Clawson Co. vs. Carlyle Paper Co., 133 Ill. App., 61, 64 to 67,* a contract to furnish machines, to be delivered free on board cars at Hamilton, Ohio, and to "furnish the time of a competent man to superintend and assist in the erecting of the machinery" at the purchaser's mill in Illinois was held to be interstate commerce, the Court citing *Milan Co. vs. Gorten, supra.*

In *Chase Engine & Mfg. Co. vs. Vromania, etc., Co., 133 S. W. R., 624 (Mo. App., 1911),* a contract for manufacture, delivery and erection of machinery, the corporation agreeing also to furnish men, if required, to start the machiney, was held to be interstate commerce.

In *Wolf Co. vs. Kutch, 132 N. W. Rep., 981, 983,* the Supreme Court of Wisconsin held that,

> "The fact that plaintiff agreed to furnish "a millwright to assist the vendee in putting "the machinery in place was a mere incident to "the contract, and did not deprive it of its "interstate character."

It is not necessary that the contract to be protected should itself specify or require goods from another State. The substantial character of the business transaction is controlling.

In *Rearick vs. Pennsylvania, 203 U. S., 507, 511-512,* an Ohio corporation employed an agent to solicit in Sunbury, Pennsylvania, retail orders for

groceries. The State court sustained a conviction of the agent for selling without a license, on the ground that his contracts "would have been satisfied by the delivery of articles corresponding to sample, although bought at the next door," but this court held that to be immaterial, and Mr. Justice Holmes speaking for the Court said:

> "With regard to this argument it might be "an interesting question whether the shipments "described amounted to authorized appropria- "tions of the goods to the contracts, notwith- "standing the fact that the deliveries were to "be only for cash; but we are not required to "go into such niceties. The decisions already "in the books go as far as it is necessary for "us to go in order to decide this case."
>
> "'Commerce among the several states is a "practical conception, not drawn from the wit- "ty diversities' ([Yaites vs. Gough] Yelv. 33) "of the law of sales. Swift & Co. vs. United "States, 196 U. S., 375, 398, 399."

In the case last cited by Mr. Justice Holmes, he delivered the opinion of the Court, and said:

> "Commerce among the states is not a "technical legal conception, but a prac- "tical one drawn from the course of business. "When cattle are sent for sale from a place "in one state, with the expectation that they "will end their transit after purchase in an- "other, and when, in effect, they do so, with "only the interruption necessary to find a pur- "chaser at the stock yards, and when this is "a typical, constantly recurring course, the "current thus existing is a current of com-

"merce among states, and the purchase of the "cattle is a part and incident of such commerce. "What we say is true at least of such a pur- "chase by residents in another state from that "of the seller and of the cattle. And we need "not trouble ourselves at this time as to wheth- "er the statute could be escaped by any ar- "rangement as to the place where the sale in "point of law is consummated. See Norfolk "& W. R. Co. vs. Sims, 191 U. S. 441."

"Commerce among the several states is a practical conception," that is, the law is to be applied to the thing actually done, and not to what *might* have been done.

In the case at bar it is clear that plaintiff was carrying on an interstate commercial business, and the work it did in setting the frames and hanging the sash was not only of relatively small amount, not exceeding 7½ per cent. of the value of the whole contract, but was purely incidental to the sale and delivery of its product.

The interstate commerce provision of the Federal Constitution would be seriously impaired if, in order to claim its protection for such a business, the place of origin of the goods must be expressly stated in and with each transaction, or if the seller must keep away from the place of delivery and refrain from erecting, placing or adjusting his machinery or other products.

POINT VI

The New York statute referred to is in contravention of the Federal Constitution, and the provision that the corporation may not maintain any action in any court in the State is inseparable from the rest of the statute, and falls with it.

The provisions of the statute referred to makes it clearly invalid under the principles established by this Court.

In *International Text Book Co. vs. Pigg., 217 U. S., 91, 108 to 112,* the statute involved was substantially identical with that in the case at bar, and this Court held that it regulated interstate commerce and was invalid. Mr. Justice Harlan, delivering the opinion of the Court, said:

> "In the first place, it is made a condition "precedent to the authority of a corporation "of another state, except banking, insurance, "and railroad corporations, to do business in "Kansas, that it shall prepare, deliver, *and "file with the secretary of state* a detailed "'statement,' * * *
>
> "In the next place, the statute denies to the "corporation doing business in Kansas the "right to maintain an action in a Kansas "court, *unless it shall first obtain* a certificate "of the secretary of state to the effect that "the statement required by §1283 *has been "properly made.*
>
> "Was it competent for the state to prescribe, "as a condition of the right of the Text-book

"Company to do interstate business in Kansas, "such as was transacted with Pigg, that it "should prepare, deliver, and file with the "secretary of state the statement mentioned "in §1283? The above question must be an- "swered in the negative upon the authority "of former adjudications by this court. A "case in point is Crutcher vs. Kentucky, 141 "U.S., 47, 56, 57, often referred to and "never qualified by any subsequent decision. "* * *

"It is true that the statute does not, in "terms, require the corporation of another "state engaged in interstate commerce to take "out what is technically 'a license' to trans- "act its business in Kansas. But it denies all "authority to do business in Kansas unless the "corporation makes, delivers, and files a 'state- "ment' of the kind mentioned in §1283. The "effect of such requirement is practically the "same as if a formal license was required as "a condition precedent to the right to do such "business. In either case it imposes a *condi- "tion* upon a corporation of another state "seeking to do business in Kansas, which, in "the case of interstate business, is a regulation "of interstate commerce and directly burdens "such commerce. The state cannot thus bur- "den interstate commerce. It follows that the "particular clause of §1283 requiring that "'statement' is illegal and void.

"In this connection it is to be observed that "by the statute the doors of Kansas courts "are closed against the Text-book Company, "unless it *first* obtains from the secretary of

"state a certificate showing that the 'state-
"ment' mentioned in §1283 has been properly
"made. In other words, although the Text-
"book Company may have a valid contract
"with a citizen of Kansas, one directly arising
"out of and connected with its interstate busi-
"ness, the statute denies its right to invoke
"the authority of a Kansas court to enforce
"its provisions unless it does what we hold
"it was not, under the Constitution, bound to
"do; namely, make, deliver, and file with the
"secretary of state the statement required by
"§1283. If the state could, under any cir-
"cumstances, legally forbid its courts from tak-
"ing jurisdiction of a suit brought by a cor-
"poration of another state, engaged in inter-
"state business, upon a valid contract arising
'out of such business, and made with it by a
"citizen of Kansas, it could not impose on the
"company, *as a condition of its authority to*
"carry on its interstate business in Kansas,
"that it shall make, deliver, and file that
"statement with the secretary of state, and
"obtain his certificate that it had been prop-
"erly made. * * * It results that the pro-
"vision as to the statement mentioned in §1283
"must fall before the Constitution of the United
"States, and with it—according to the estab-
"lished rules of statutory construction—must
"fall that part of *the same section* which pro-
"vides that the obtaining of the certificate of
"the secretary of state that such statement has
"been properly made, shall be a condition pre-
"cedent to the right of the plaintiff to main-
"tain an action in the courts of Kansas."

In the case at bar, likewise, it is made a condition precedent to the right of this foreign corporation to do business in New York that it shall file a statement, and the doors of New York Courts are closed against it unless it has procured a certificate that it has done so. Indeed the requirements of the New York statute are more numerous and more stringent. They impose as additional conditions the filing of a copy of the charter, the establishment of an office, the designation of an agent for service of process, and the payment of a fee, besides the payment of a franchise tax within thirteen months after beginning business (pages 27-28, "4"; page 33, "III"; and tax law hereinabove quoted. Most, if not all, of these requirements were contained in the Kansas statute also, but in sections not relied upon by the state court.

POINT VII

Plaintiff performed on its part all the conditions of the contract.

The Referee found the terms of the contract as alleged by plaintiff (page 26, "3"). He found that plaintiff duly delivered all of the frames and sash required by the contract and placed some of them in position (page 36, "XV", "XVI", "XIX"; page 38, "XXXI"; page 39, "XLIV"; page 40, "XLVI" to "XLVIII"; that it was always ready and willing to place the rest (page 37, "XXI"; page 38, "XXXII"; page 39,

"XLIII"), but that defendant prevented it from doing so, and, against its protest, caused the rest to be placed by another company (page 37, "XX" and "XXII"); and that before the beginning of this action plaintiff supplied certain hardware and remedied certain defects, "and thereby completed the work required by the said contract" (page 39, "XLV").

POINT VIII

The interference of defendant excused performance to the extent of the work which defendant caused to be done by others.

In *United States vs. Peck, 102 U. S., 46*, a case involving a contract of sale, Mr. Justice Bradley, delivering the opinion of this Court, said:

> "We agree with the Court of Claims in this "case that the defendants, the United States, "were not entitled to deduct from the claim- "ant's demand for the wood cut and delivered "by him, any amount by reason of his failing "to furnish the hay which he contracted to "do. * * * It would be a fraud on him to "hold him to the performance of that which "he was prevented from performing by the "acts of the defendants' agents, in giving to "other parties the only hay to be procured on "or near the Yellowstone River, and enabling "them to supply to the Government, for the

"use of the station which he was to supply, the "very hay which he had relied on, and which "he had been encouraged to rely on, in the "fulfillment of his contract. * * * An in- "nocent contractor should not be made to "suffer for these contingencies. If by their oc- "currence the defendants themselves, through "their agents, rendered it impossible for the "claimant to perform his engagement, he "ought not to be visited with the penalty of "nonperformance."

In *Kingsley vs. Brooklyn*, 78 N. Y., 200, 216-217, a case arising out of a contract for the construction of water works, the Court said:

"The paving of the dam was left incom- "plete, the slopes of the reservoir not paved, "the forty-seven acres below Nichols pond un- "touched, the surface of the ground not "cleared, the buildings not all removed, the "spoil banks not smoothed, and the work was "incomplete. But the proof shows that the "plaintiffs were driven from the work by the "defendant's agents; and the referees found "that they performed the contract until "stopped, and were entitled to recover with- "out producing the certificate. This finding "was clearly right if the acts of the defend- "ants arrested the further prosecution of the "work. A party who prevents performance "by his own act is in no position to object that "the contract remained unperformed. Hochster "vs. De LaTour, 20 E. L. & Eq., 157, 160; "Burtis vs. Thompson, 42 N. Y., 246; 1 Am. "Rep., 516. The rule is also well settled that "where performance is rendered impossible

"by the act of the law or of the other party, "non-performance is excused. Shellington vs. "Howland, 53 N. Y., 372; Heine vs. Meyer, 61 "id., 171; Niblo vs. Binsse, 1 Keyes, 478."

In the case at bar plaintiff did everything required by the contract, in point of quantity and quality of frames, sash, materials and work, except to the extent that it was prevented by defendant from setting frames and hanging sash.

POINT IX

Defendant waived any default of strict performance on the part of plaintiff.

The Referee has expressly found such waiver as to the time within which the contract was to be completed (page 35, "XIII"), but the waiver was more inclusive:

(a) While defendant was having frames set and sash hung by another contractor, it was still proceeding under the contract in suit and confirming it.

It was accepting, using and incorporating into the building, the frames and sash which plaintiff furnished under the contract and still owned —the very frames and sash to which objection had been made.

Even if the contract in suit had been one for the purchase and sale of specific articles, and even if plaintiff had delivered all the sash—which it had not done (page 39, "XLIV")—the result would have been the same.

In *The Elgee Cotton Cases, 22 Wallace, 180, 187, 188*, which arose out of an agreement for the sale of all the cotton at a certain place, Mr. Justice Strong, delivering the opinion of the Court, said:

> "It must be admitted there is often great "difficulty in determining whether a contract "is itself a sale of personal property so as to "pass the ownership to the vendee, or whether "it is a sale on condition, to take effect or be "consummated only when the condition shall "be performed, or whether it is a mere agree- "ment to sell. It is, doubtless, true, that "whether the property passes or not is depend- "ent upon the intention of the parties to the "contract, and that intention must be "gathered from the language of the instru- "ment. There are, however, certain rules for "the construction of such contracts, which are "well settled in England and, we think, also "in this country. Mr. Justice Blackburn, in "his work on sales (pages 151, 152) states two "of them, and Mr. Benjamin, in his treatise "(2d. ed., page 236), adds a third. They are "as follows:
>
> "FIRST.—'When, by the agreement, the ven- "'dor is to do anything to the goods for the "'purpose of putting them into that state in "'which the purchaser is bound to accept "'them, or, as it is sometimes worded, into a "'deliverable state, the performance of those

"'things shall, in the absence of circumstances "'indicating a contrary intention, be taken to "'be a condition precedent to the vesting of "'the property.'

"SECOND.—'Where anything remains to be "'done to the goods for the purpose of ascer- "'taining the price, as by weighing, measuring "'or testing the goods, where the price is to "'depend on the quantity or quality of the "'goods, the performance of these things shall "'also be a condition precedent to the transfer "'of the property, although the individual "'goods be ascertained and they are in the "'state in which they ought to be accepted.'

"THIRD.—'Where the buyer is by the con- "'tract bound to do anything as a considera- "'tion, either precedent or concurrent, on "'which the passing of the property depends, "'the property will not pass until the condi- "'tion be fulfilled, even though the goods may "'have been actually delivered into the posses- "'sion of the buyer.'

"These may be regarded as rules for ascer- "taining the intention of the parties. They "are, in most cases, held to be conclusive "tests."

The case at bar falls under the "first" of these rules, for the contract required plaintiff to put the frames and sash in place before defendant was bound to accept them (page 26, "3").

In *Johnson vs. Hunt, 11 Wend., 137, 140*, it was held, that materials delivered at the building by a contractor remain his property until they are affixed to the free-hold.

To the same effect are:

Bayley vs. Anderson, 71 Wis., 417;
Wooten vs. Reed, 10 Miss., 589;
Manchester Mills vs. Rundlett, 23 N. H., 271, 273.

In the case at bar it is clear that defendant first accepted and made these frames and sash its property under the contract by causing them to be affixed to its building, and thereby waived any default or delay on the part of plaintiff, and became liable to pay for them.

(b) Defendant also waived any previous default in strict performance of conditions by recalling plaintiff and allowing it to complete the work under the contract (page 39, "XLV"; pages 41-42, "LVIII").

In *Phillips, etc., Construction Co. vs. Seymour, 91 U. S., 646, 649, 656*, a case arising out of a contract to build a railway, where the contractor failed to perform within the time agreed, Mr. Justice Miller delivering the opinion of the Court, said:

> "If the other party says to him, 'I prefer
> "'you should finish your work,' or should im-
> "pliedly say so by standing by and permitting
> "it to be done, then he so far waives absolute
> "performance as to consent to be liable on his
> "covenant for the contract price of the work
> "when completed.
>
> "For the injury done to him by the broken
> "covenant of the other side, he may recover
> "in a suit on the contract to perform within
> "time; or, if he wait to be sued, he may re-
> "coup the damages thus sustained in reduc-

"tion of the sum due by contract price for com-
"pleted work."

This was so held with reference primarily to a default by mere delay in performance, but it is evident that the principle applies to other defects of performance as well.

In the case at bar, it is obvious that defendant treated the contract throughout as still subsisting, and that the only question it raised was as to the allowance, if any, to be made for the work which it had supplied.

POINT X

No condition or ground of forfeiture is found in Article VIII of the contract, the article upon which the defense relies.

This article, hereinafter quoted in full, is a subordinate term of the contract. The only obligation it lays upon plaintiff is to "make good to the owner (the defendant) any loss or damage caused" by certain things. It does not provide, and it cannot be construed as providing, that plaintiff will, at all hazards, prevent such loss or damage, nor that in case such loss or damage occurs plaintiff may be ousted, and shall thereupon lose all rights under the contract. Any such effect is inconsistent with the agreement for compensation.

It may be noted in this connection, that, even taking the Referee's view of the case, the amount

unpaid on the contract is more than enough to so "make good" defendant's alleged loss, being $4,506.28 (pages 26-27, "3"; page 30, "22"; page 36, "XVI"; page 42, "LXV") as against a counterclaim of $3,796.76 (page 30, "VII").

POINT XI

There is no ground for defendant's counterclaim.

Article VIII of the contract, upon which the defendant's claim rests, is as follows:

> "The Owner agrees to provide all labor and "materials not included in this contract in "such manner as not to delay the material "progress of the work, and in the event of fail-"ure so to do, thereby causing loss to the Con-"tractor, agrees that he will reimburse the "Contractor for such loss; and the Contractor "agrees that if he shall delay the material prog-"ress of the work so as to cause any damage "for which the Owner shall become liable (as "above stated), or, in the event of any strike "or cessation of work, caused by character or "condition of labor employed or material fur-"nished, continuing for 8 days, that the Owner "shall have full authority to arbitrate or ad-"just the matter and the Contractor shall "make good to the Owner any loss or damage "caused. The amount of such loss or damage "to either party hereto shall, in every case, be "fixed and determined by the Architect or by

"arbitration, as provided in Art. III of this "contract" (page 28, "5").

This article is obscure in its phraseology and application, but an endeavor should be made to so construe it that the different clauses may be consistent one with another and that each clause may have some proper effect.

The article starts out with an unqualified agreement on the part of defendant, the Automobile Club, to provide all labor and materials not included in the contract in such manner as not to delay the work and in the event of failure so to do to reimburse the plaintiff for any loss.

Plaintiff, on the other hand, does not agree to refrain from delay, but that if it so delays the work as to cause any damage "for which the owner shall become liable *as above stated*" (the only liability above stated being to plaintiff itself) or in the event of any strike or cessation of work caused by character or condition of labor employed or material furnished continuing for 8 days (this being apparently a specification of one anticipated cause of delay) defendant shall have authority to arbitrate or adjust the matter and plaintiff shall make good to defendant any loss or damage caused. The next sentence explains that the arbitration or adjustment referred to is merely to determine the *amount* of such loss or damage, if any, but, even without this, the article could not be construed to give to defendant or to the architect employed by its authority, under guise of "adjustment", to displace plaintiff, or to determine the question whether or not it was in default.

On the whole, it is defendant, the Automobile

Club, that this article makes responsible, without any exception of strikes or other causes of delay, for all labor and materials not included in the contract in suit, while the plaintiff is made responsible only for those within its own contract.

(a) Plaintiff did its whole duty under the contract when it furnished good materials and labor.

It cannot properly be held responsible for the consequences of unfounded objections or for the acts of laborers whom it did not select and had not employed, or for those of any and all outsiders who might choose to object to its materials or labor. No strike was caused by the character or condition of labor employed or material furnished by plaintiff. On the contrary, all the trouble was caused by the character of other people.

But even if we consider plaintiff responsible under objections so made, whether well founded or not,

(b) The objection raised by the labor-union was not within the meaning of the clause in question.

The objection was not to the character of labor employed under the contract, that is, labor employed in setting the frames and hanging the sash, nor to the character or condition of the materials. It was an objection to the fact that they had been made in Philadelphia that is, to their past history, their origin, and went beyond anything contemplated in the contract—as much so as if objection

had been raised to the source from which plaintiff obtained its supply of steel or of coal. Plaintiff supplied frames and sash of good quality, satisfactory in all respects to defendant and its architect and it employed competent and well behaved workmen to do the work of setting them (page 38, "XXVII"; "XXXI"; "XXXII"). To plaintiff's workmen no objection was made.

(c) The strike, or cessation of work, or delay for which plaintiff was to be liable was only its own work under the contract.

The intention to make it liable for loss caused by strikes on other parts of the building, *that is, sympathetic strikes*, cannot be inferred, but must be clearly expressed, otherwise plaintiff cannot be held liable for such remote and consequential damages.

(d) There was no actual strike, but only the threat of a strike, at the time when defendant employed the other contractor to hang sash (page 39, "XXXVI").

Only $709.28 of the counterclaim was for work theretofore done in setting frames (page 37, "XX").

(e) Defendant did not sustain any "loss" at all.

At the best it weakly yielded to the demands of a labor-union with which plaintiff's workmen had

no connection, and its payment to the confederates of that union of three or four times as much as it would have had to pay to plaintiff for the same work was *voluntary*. If defendant had resisted those demands as plaintiff did, there might have been no loss at all, and in any event defendant, on its own construction of the contract, would have had its remedy against plaintiff for whatever loss it did in fact sustain. Certainly plaintiff should not have been left, as the court below left it, at the mercy of the other party to the contract, *to turn over its rights to be looted by a competitor, a confederate of the labor-union* (page 37, "XXXII," page 40, "XLIX").

(f) Even the amount of counterclaim was not shown.

The sum of $3,796.76, which defendant claims as paid for the work which it had done by another contractor, was clearly excessive, and the Referee has found that it included an indefinite amount of charges for alleged work done in repairing and readjusting the frames and sash because of their alleged bad condition, although they were delivered to defendant in good condition and had remained in its possession many months before they were put in position (page 41, "LIV").

If it is claimed that defendant is entitled to be credited with the amount which it would have cost plaintiff to do that work, the Referee has not found it exactly, but found that it would not have exceeded the sum of $1,000.00 (page 39, "XXXIX"), and,

in another connection, he has found that the cost of *all* the labor would not have exceeded $1,000.00 (page 42, "LXII"), and that the cost of setting the frames, of which plaintiff set 305 (page 36, "XIX"), did not exceed $1.50 each (page 37, "XXa"), from which it would appear that the cost to plaintiff of doing the work which defendant had done by another contractor would have been about $550.00.

POINT XII

Defendant became a party to an unlawful interference with interstate commerce, and cannot be allowed thereby to avoid payment under its contract.

The labor-union, whose plans defendant carried out and whose demands defendant effectuated by its act in displacing plaintiff and replacing it by another contractor, was engaged in an unlawful boycott.

In *Loewe vs. Lawlor, 208 U. S. 274, 292 to 298, 304*, an action for damages under the Sherman act, Mr. Chief-Justice Fuller, delivering the opinion of the Court, said:

> "In our opinon, the combination described "in the declaration is a combination 'in re- "straint of trade or commerce among the sev- "eral states,' in the sense in which those words "are used in the act, and the action can be "maintained accordingly.

"And that conclusion rests on many judg-
"ments of this court, to the effect that the act
"prohibits any combination whatever to se-
"cure action which essentially obstructs the
"free flow of commerce between the states, or
"restricts, in that regard, the liberty of a
"trader to engage in business.

"The combination charged falls within the
"class of restraints of trade aimed at compel-
"ling third parties and strangers involuntarily
"not to engage in the course of trade except
"on conditions that the combination imposes;
"and there is no doubt that (to quote from the
"well-known work of Chief Justice Erle on
"Trade Unions) 'at common law every per-
" 'son has individually, and the public also has
" 'collectively, a right to require that the course
" 'of trade should be kept free from unreason-
" 'able obstruction.' But the objection here is
"to the jurisdiction, because, even conceding
"that the declaration states a case good at
"common law, it is contended that it does not
"state one within the statute. Thus, it is said
"that the restraint alleged would operate to
"entirely destroy plaintiff's business and
"thereby include intrastate trade as well;
"that physical obstruction is not alleged as
"contemplated; and that defendants are not
"themselves engaged in interstate trade.

"We think none of these objections are ten-
"able, and that they are disposed of by pre-
"vious decisions of this Court."

Then, quoting from *In re Debs*, 158 *U. S.*, 564, the question asked by Mr. Justice Brewer:

> "If a state, with its recognized powers of "sovereignty, is impotent to obstruct inter-"state commerce, can it be that mere volun-"tary association of individuals within the "limits of that state has a power which the "state itself does not possess?"

The Chief Justice proceeds:

> "The question answers itself; and in the "light of the authorities the only inquiry is "as to the sufficiency of the averments of "fact. We have given the declaration in full "in the margin, and it appears therefrom that "it is charged that defendants formed a com-"bination to directly restrain plaintiffs' trade; "that the trade to be restrained was inter-"state; that certain means to attain such re-"straint were contrived to be used and em-"ployed to that end; that those means were so "used and employed by defendants, and that "thereby they injured plaintiffs' property and "business."

The allegations in that case set forth a combination and acts substantially the same as those of the labor-union in the case at bar, and we submit that the contract here in question should not be so construed as to assist in carrying them out. To prevent the manufacturer and vendor from itself setting in place the frames and sash it has brought to New York in the course of its interstate commerce, and to require it to turn them over to be set by unskilled strangers at a ruinous expense is in fact a prohibition of such interstate commerce. It was indeed the avowed purpose to prevent such

commerce, for the objection to the frames and sash, upon which plaintiff was prevented from placing them, was that they were made "in the enemy's country," i. e. in Pennsylvania (page 40, "XLIX").

In *Irving vs. Joint Distr. Council of N. Y., etc., 180 Fed., 896, 901*, a suit against members of the "United Brotherhood of Carpenters," who were threatening a strike of the same character and for the same purpose as in the case at bar, an injunction was granted to restrain "the calling out of the employees in other trades, who have no grievance against their employers, and the notification of owners, builders, architects, and third persons, that they are likely to have their operations held up if they use the complainants' trim," citing *Adair vs. U. S., 208 U. S., 161, 174*, and *Purvis vs. Local No. 506, 214 Pa., 348, 353.*

POINT XIII

In substance and effect the Referee's report was in favor of the plaintiff.

It is only superficially that the judgment sought to be reviewed can be said to be "according to the Referee's report." The Referee's legal conclusions are overborne by his specific findings, from which, as we have shown, conclusions should have been drawn directly the opposite of those reported.

From his findings of fact as to the interstate character of the transactions involved in the suit,

the only logical conclusion is, that they are protected by the Federal Constitution and that the contract is valid and enforcible. Specifically, he found that plaintiff performed every term of the contract which, properly interpreted, could be considered as a condition, except only so far as performance was *prevented by defendant;* he found acts of defendant which amounted to a waiver of any default on the part of plaintiff; he found that defendant had failed to pay; while he found no facts upon which a forfeiture of plaintiff's rights can rest or upon which a counterclaim can be maintained; and the conclusion necessarily follows that plaintiff was entitled to recover.

POINT XIV

It follows that the motion to dismiss or affirm should be denied and that the judgment should be reversed and judgment directed in favor of plaintiff, with costs.

The amount unpaid on the contract as found by the Referee is four thousand five hundred six 28/100 dollars ($4,506.28).

Dated, New York, December 1, 1911.

Respectfully submitted,

WILLIAM FORSE SCOTT,
WILLIAM FORD UPSON,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 137.

DAVID LUPTON'S SONS COMPANY,

Plaintiff in Error,

vs.

THE AUTOMOBILE CLUB OF AMERICA.

Brief for Plaintiff-in-Error in Opposition to Defendant's Motion to Dismiss or [illegible].

WILLIAM FORD UPSON,
Counsel for Plaintiff-in-Error.

Press of Fremont Payne, 47 Broad St.—Phones, [illegible] Broad.

Supreme Court of the United States

DAVID LUPTON'S SONS COMPANY, Plaintiff-in-Error, vs. THE AUTOMOBILE CLUB OF AMERICA.	October Term, 1911. No. 137.

Brief for Plaintiff-in-Error in Opposition to Defendant's Motion to Dismiss or Affirm.

Statement of the Case.

This action was brought in the United States Circuit Court for the Southern District of New York, by David Lupton's Sons Company, a Pennsylvania corporation, against The Automobile Club of America, a New York corporation, to recover five thousand dollars with interest, for breach of contract.

The plaintiff had a factory in Philadelphia, where it manufactured metal window frames and

sash, and the contract in suit was for furnishing such frames and sash, and putting them in place in the defendant's club house in New York.

The defenses upon which the complaint was dismissed and judgment rendered against the plaintiff were, that the plaintiff, as a foreign corporation which had not obtained authority to do business within the State of New York under the statute of that State, was not entitled to maintain any action upon the contract (page 9) and that the defendant rightfully excluded it from the building and prevented it from completing its work because a labor union objected to its products and threatened a strike upon other work in the building if it was allowed to continue.

The New York practice does not require nor allow a reply to such defenses (page 33, "IV").

> Code of Civ. Proc., §514.
>
> "Reply; what to contain. Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim.
>
> §522. * * * But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be *deemed controverted by the adverse party, by traverse or avoidance, as the case requires.*"

By order of the Circuit Court, entered upon written consent of the attorneys for both parties, trial was had before a referee "to hear and determine the issues" (page 15); the referee made detailed findings of fact and conclusions of law (pages 26 to 30); his report was recommitted by order of the

Court (page 32) for additional findings, which he thereupon made (pages 33 to 44); and the plaintiff filed exceptions (pages 46 to 49).

Upon the defendant's motion for judgment, the plaintiff presented its exceptions to the Court and moved the Court to reject the report of the referee, but the Court declined to consider the exceptions or any of them, to which ruling the plaintiff excepted, and the Court directed judgment according to the report of the referee (pages 52-53).

Judgment was entered accordingly (pages 53-54), dismissing the complaint, on the merits, with costs.

The referee found in detail the following facts relating to the jurisdiction of the Court and the plaintiff's prima facie right to recover.

The plaintiff is, and at all times mentioned in the complaint was, a business stock corporation, other than a moneyed corporation, under the laws of the State of Pennsylvania; and the defendant is, and at all times was, a corporation, under the laws of the State of New York (page 26, "1" & "2"; page 33, "1" & "11":

On or about August 17, 1905, the defendant entered into a written contract in the City of New York with the plaintiff whereby the plaintiff agreed to manufacture and place in position upon the premises of the defendant in New York City, metal window frames and sash, necessary for the building to be erected by the defendant upon said premises, and to provide all the materials and perform all the work necessary in connection therewith, for the sum of $10,344.00 (page 26, "3"); the frames

were to be set on or before November 15, 1905, and the work was to be completed December 15, 1905; if the plaintiff should be obstructed or delayed in the prosecution or completion of its work by the act, neglect, delay or default of the defendant or its architect, or of any other contractor employed by the defendant upon the work, then the time fixed for the completion of the work was to be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; the defendant was to provide all labor and materials not included in the said contract in such manner as not to delay the material progress of the work, and in the event of its failure so to do, thereby causing loss to the plaintiff, it was to reimburse the plaintiff for such loss (page 35, "X").

The plaintiff began promptly to manufacture and furnish the frames and sash and to do the work under the said contract, and was able and willing to set the frames on or before November 15, 1905, and to complete the work December 15, 1905, but defendant failed to provide the labor and materials required on the building and not included in the contract, within the time limited for plaintiff's part of the work, and in particular failed to erect the walls of the building to a sufficient height for the setting of the frames until after that time; and was not prepared to receive the sash and allow them to be hung and the work completed until after February 6, 1907 (page 35, "XII"), and the delay in time of performance of the contract was waived (page 35, "XII").

Before the date last mentioned the plaintiff had manufactured and delivered to the defendant all of the frames and sash, but under circumstances herinafter stated, it had been interrupted and it

was then finally excluded by the defendant, which employed another contractor to put in place the few remaining frames and to hang the sash (page 29, "19;" pages 36-37, "XV" to "XX;" page 39, "XL" to "XLIV").

Thereafter and before July 18, 1907, at the defendant's request, the plaintiff supplied a small amount of hardware, not exceding $125.00 in value, and remedied certain small defects, all to the satisfaction of the architect employed as the agent of the defendant, and thereby completed the contract (pages 39-40, "XLV" to "XLVIII" and page 41, "LVIII").

The work done by plaintiff under the contract was skillful and efficient, and the materials furnished by it were sufficient and of good quality (page 38, "XXXI") and the plaintiff, at all times until its exclusion, supplied and thereafter was ready and willing to supply a sufficient number of properly skilled workmen for the prosecution and completion of the work under the contract (page 38, "XXXII").

The reasonable value of the frames, sash and materials required by the contract was at least Nine thousand, three hundred and forty-four dollars, and the cost of the labor, if the plaintiff had been able to perform it with its trained employees, would not have exceeded $1,000 to the plaintiff (page 42, "LXI" and "LXII").

In July, 1906, the defendant paid Five thousand eight hundred thirty-seven dollars and seventy-two cents ($5,837.72) upon the contract price, but it has failed and refused to make any further payment (page 36, "XVI"), thus leaving unpaid the sum of Four thousand five hundred six and 28/100 dollars ($4,506.28).

As to the defense under the New York statute, the referee found the following facts:

At the time of entering into the contract, the General Corporation Law of the State of New York, being Chapter 563 of the laws of 1890, as amended to that date, provided among other things as follows:

> "Section 15. Certificate of authority of a foreign corporation. No foreign stock corporation, other than a moneyed corporation, shall do business in this state without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The Secretary of State shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December thirty-first, eighteen hundred and ninety-two, without having procured such certificate from the Secretary of State, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this

state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word 'trust,' 'bank,' 'banking,' 'insurance,' 'indemnity,' 'guaranty,' 'savings,' 'investment,' 'loan,' or 'benefit,' as a part of its name."

"SECTION 16. Proof to be filed before granting certificate. Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the State, and a place within the State which is to be its principal place of business, and designating in the manner prescribed in the Code of Civil Procedure a person upon whom process against the corporation may be served within the State. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the State.

Such designation shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this State. If the person so designated dies or removes from the place where the corporation has its principal place of business within the State, and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, the Secretary of State may revoke the authority of the corporation to do business within the State, and process against the corporation in an action upon any liability incurred within this State before such revocation, may, after such death or removal, and before another designation is made, be served upon the Secretary of State. At the time of such service the plaintiff shall pay to the Secretary of State Two dollars, to be included in his taxable costs and disbursements, and the Secretary of State shall forthwith mail a copy of such notice to such corporation if its address or the address of any officer thereof is known to him" (pages 27-28, "4").

In order to obtain a certificate of authority to do business within the State of New York under Section 15 of the General Corporation Act of said State, it was necessary at the time in question herein, to pay to the Secretary of State a fee of $10, and to the State Treasurer a franchise tax (page 33, "III").

The provision for franchise tax referred to by the referee was as follows:

181. License tax on foreign corporations. Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, authorized to do business under the general corporation law, shall pay to the State Treasurer, for the use of the State, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State to be computed upon the basis of the capital stock employed by it within this State, during the first year of carrying on its business in this State; and if any year thereafter any such corporation shall employ an increased amount of its capital stock within this State, the same license fee shall be due and payable upon any such increase. The tax imposed by this section on a corporation not heretofore subject to its provisions shall be paid on the first day of December, nineteen hundred and one, to be computed upon the basis of the amount of capital stock employed by it within the State during the year preceding such date, unless on such date such corporation shall not have employed capital within the State for a period of thirteen months in which case it shall be paid within the time otherwise provided by this section. No action shall be maintained or recovery had in any of the courts in this State by such foreign corporation without obtaining a receipt for the license fee hereby imposed within thirteen months after beginning such business

within the State, or if at the time this section takes effect such a corporation has been engaged in business within this State for more than twelve months without obtaining such receipt within thirty days after such tax is due (Section 181 of the Tax Law, as amended by L. 1901, Ch. 558).

According to the Code of Civil Procedure of the State of New York no reply was required or allowed to the defense founded upon Section 15 of the General Corporation Law of said State (page 33 "IV").

At the time of entering into the contract and for some time prior thereto, the plaintiff was doing business within the State of New York, within the meaning of said Section 15 of the General Corporation Law of the State of New York and it had not procured from the Secretary of the State of New York, a certificate, as required by said section, prior to doing business in the State of New York, or prior to entering into the contract sued on herein (page 29, "6," "7" and "8").

The character of the plaintiff's business, and of the transaction in suit, as interstate commerce, are found by the referee as follows:

At all of said times the plaintiff was engaged in the business of manufacturing metal window frames and sash at its factories in the State of Pennsylvania and selling the same and causing them to be transported to other states, including the State of New York, and there delivered and put in place in the buildings for which they were so

manufactured (page 34, "V"). The cost or price of putting in place such frames and sash did not exceed on the average, in the general business of the plaintiff, 7½ per cent. of their value or price (page 34, "VI"). The plaintiff had a representative and an office in the City of New York. This representative solicited orders, incidentally negotiated in affairs there and used the said office; he could not make a contract nor do more than report opportunities to the plaintiff corporation in Philadelphia. He kept no general books of account, made no general payments, collected no accounts except for remittance, and his own salary was paid from Philadelphia (page 34, "VII"). All of the frames and sash supplied by the plaintiff to the defendant under the contract were manufactured by the plaintiff at its factories in the State of Pennsylvania and thence transported to the State of New York after and pursuant to the said contract, and thereupon delivered to the defendant (page 36, "XIV").

Upon the trial of this action, in opposition to defendant's motion to dismiss the complaint at the close of the evidence, the plaintiff's counsel maintained that said Statute of the State of New York does not bar this suit for the following reasons:

The Statute has no reference to suits in the Federal Court, and cannot affect the jurisdiction of such Court.

The transactions upon which the suit is brought were transactions of commerce between the State of Pennsylvania and the State of New York.

The Statute of the State of New York with reference to foreign corporations should not be construed to apply to transactions of interstate commerce.

If the Statute be construed as affecting the transactions involved in this suit, it is contrary to the Constitution of the United States, and especially that clause of the Constitution which gives to the Congress alone the power to regulate commerce between the States.

And the plaintiff, with respect to the Statute of the State of New York referred to, thereupon claimed the protection and advantage of the Constitution of the United States relating to commerce between the States, and moved for judgment in its favor against the defendant for the amount claimed in the complaint (page 43, "LXVI").

As to the exclusion of the plaintiff from the building, and the defense of an alleged breach of contract on its part, the Referee found the following facts:

The contract in suit provided, among other things, as follows:

> "ART. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), or, in the event of any strike or cessation of work, caused by character or

condition of labor employed or material furnished, continuing for 8 days, that the Owner shall have full authority to arbitrate or adjust the matter and the contractor shall make good to the Owner any loss or damage caused. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect or by arbitration, as provided in Art. III of this contract."

"ART. III. No alteration shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Architect, and when so made, the value of the work added or omitted shall be computed by the Architect, on written notice to each of the parties hereto, who shall also be notified in writing of the amount so fixed, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference" (page 28 "5").

In general terms, the referee finds that the plaintiff failed to set a few of the frames and failed to hang all of the sash; that on or about July 3, 1906, a strike occurred upon the building of the defendant upon which plaintiff was at work, and the men of all of the trades employed upon the building,

except the men who were employed by and working for the plaintiff, left the building because of the character of the labor employed and material furnished by the plaintiff; that the plaintiff refused to furnish different labor or material; that on or about July 21, 1906, the defendant "under adjustment of Ernest Flagg as such architect" took possession of the premises and employed other persons to complete the work, necessarily expending therefor the sum of $3,796.76, "certified by Ernest Flagg as architect," the difference between the amount thus paid and the amount unpaid upon the contract being $709.52 (pages 29-30, "9" to "21" and "23").

But, in response to plaintiff's requests for further findings of fact, he finds the following:

In July, 1906, while plaintiff was engaged in the work of setting the frames in place, a certain labor union made objections to the frames and sash on the ground that they had not been made in New York, or at least east of the Hackensack River, by its own members, and a certain employers' association supported it in such objections (page 36, "XVII"). Members of both were on a joint "committee" to which complaint had been made against plaintiff (page 36, "XVIII").

On or about July 12, 1906, when the plaintiff was engaged in putting in place the frames mentioned in the contract and had put in place about 305 out of the whole number of 326, a strike occurred in the building, and all the other persons employed by the defendant in construction of this building ceased work on account of the character and condition of labor employed by the plaintiff and material furnished by it, as complained of by

the union mentioned, and the architect of the defendant did on or about the 21st day of July, 1906, insist that the plaintiff withdraw its men from the building unless such complaint should be so adjusted that the strike should be called off and work resumed by the other mechanics in the building (page 36, "XIX").

At the same time, on or about July 21, 1906, the defendant demanded that the plaintiff come to some agreement with the labor union and satisfy its objections, and, upon its refusing to do so, the defendant had the remaining 21 frames set by the Manhattan Fireproof Door Company—work for which the defendant claims to have paid over $700, being a part of the offset it claims, although if the plaintiff could have continued the work with its own men the cost of setting the frames would not have exceeded $1.50 for each or $31.50 for the 21. The plaintiff was at all times ready and willing to complete the work specified in the contract if allowed to use the sash which it had manufactured and to employ workmen of the kind it had theretofore employed and without satisfying the labor union or acceding to its demands (page 37, "XIXa" to "XXI").

On or about February 6, 1907, the defendant again demanded that the plaintiff satisfy the objections of the labor union, and, upon its refusing to do so, the defendant, against the plaintiff's protest, employed the Manhattan Fireproof Door Company to hang the sash (page 37, "XXII").

Said Manhattan Fireproof Door Company was a member of the Employers' Association, a combination of building employers in New York City, and was represented in its dealing with defendant by

its president, who was also a member of the "committee" above mentioned, which required of defendant and accomplished the removal of plaintiff and its men from defendant's building for the reason that plaintiff's shop in Philadelphia was an "open" shop and that the frames and sash were made west of the Hackensack River—"in the enemy's country," one of the defendant's witnesses said (page 40, "XLIX").

The only objection to the character of the material furnished was that the labor employed caused a strike and cessation of work on the building, and the only objection taken to the labor, and the only way in which it is claimed to have conflicted with plaintiff's or any other trade or to have interfered with the building operations is that it was not satisfactory to the New York labor union or to the Employers' Association (page 38, "XXV" and "XXVI").

There is no evidence that the laborers employed by the plaintiff engaged in any conflict of any kind with others employed upon the said building, or did anything to interefere with the work or conducted themselves at any time otherwise than as peaceable, industrious and well-behaved citizens (page 38, "XXVII").

"Except as causing this labor trouble," the work done by the plaintiff was according to the contract (page 38, "XXX").

There was no strike among any of the workmen on defendant's building in February, 1907, but a renewal of the strike was threatened by the other mechanics if plaintiff was allowed to resume work (page 39, "XXXVI").

If the plaintiff had been able to complete the con-

tract with its own experienced employees, the contract could have been completed with the material furnished by the plaintiff for a sum not to exceed $1,000.00 (page 39, "XXXIX") as against $3,800.00 paid to the Manhattan Fireproof Door Company!

The frames and sash were delivered to the defendant in good condtion; they remained in defendant's possession many months before they were put in place, and a part of the charges made by defendant in its alleged offset against defendant are due to alleged work done in repairing and readjusting the frames and sash because of their alleged bad condition (page 41, "LIV").

From these facts the Referee drew the following conclusions of law:

I. That the plaintiff has violated a statute of the State of New York, to wit, the General Corporation law of said State.

II. That the contract sued on was procured in violation of the statute of said State and was void and unenforcible by the plaintiff.

III. That the plaintiff cannot maintain an action upon said contract.

IV. That the plaintiff has failed to make out a cause of action against the defendant.

V. That upon the plaintiff's failure to proceed with the work and to perform its said contract, the defendant was justified in completing the same on its own account and charging the balance thereof to the plaintiff.

VI. That defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by the plaintiff.

VII. That the defendant has a counterclaim or set off in the sum of $3,796.76, and said amount should be allowed it and deducted from the sum, if any, due and owing to the plaintiff over and above the amount paid them on account of their contract with the defendant (page 30).

VIII. The complaint herein should be dismissed with costs.

He refused each of the following conclusions of law requested by the plaintiff:

III. In the making and performance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

IV. In making and performing the contract the plaintiff was within the protection of Article I, Section 8, Subdivision 3, of the Constitution of the United States.

V. The transactions constituting the cause of action herein were commerce between the states within the meaning of the Constitution of the United States, and as such are protected thereby from State regulation.

VI. The failure of plaintiff to obtain the certificate provided for by Section 15 of the General Corporation Law of New York does not subject it to the penalties thereof, nor prevent it from maintaining suit in this Court.

VII. The action of the defendant in putting another contractor in plaintiff's place without consent was a violation of plaintiff's rights.

VIII. Defendant has failed to establish any lawful or just ground for an offset against plaintiff's claim.

XIV. Plaintiff is entitled to judgment against defendant.

XV. Plaintiff is entitled to judgment against the defendant for the sum of Three thousand seven hundred dollars with interest from August 18, 1907, and the costs of this action (pages 43, 44).

Plaintiff filed exceptions to each of the Referee's conclusions of law (page 48, "21" to "28") and to each of his refusals to find conclusions of law (pages 48-49, "29" to "36" and "41" to "43").

As stated, the Court declined to consider these exceptions or any of them, to which ruling the plaintiff excepted, and the Court directed judgment according to the report of the Referee in an order reciting such ruling (pages 52-53), and judgment was entered accordingly (pages 53-54), dismissing the complaint on the merits with costs, the judgment reciting the plaintiff's exceptions.

The assignments of error, omitting some that are not at present important, are as follows:

I. In that the Court declined to consider the objections and exceptions filed by the plaintiff to the

rulings, findings and conclusions of the Referee, as appears by plaintiff's amended exceptions duly filed on or about July 26, 1909, or any of the said objections or exceptions.

II. In that the Court denied plaintiff's motion to reject the report of the said Referee.

III. In that the Court directed judgment against the plaintiff without acting upon the report of the Referee (page 54).

XVII. In that the Referee and the Court found and concluded that the contract sued on was procured in violation of a statute of said State and was void and unenforcible by the plaintiff.

XVIII. In that the Referee and the Court found and concluded that the plaintiff cannot maintain an action upon said contract.

XIX. In that the Referee and the Court found and concluded that the plaintiff failed to make out a cause of action against the defendant.

XX. In that the Referee and the Court found and concluded that the defendant was justified in completing the work on its own account and charging the balance thereof to the plaintiff.

XXI. In that the Referee and the Court found and concluded that defendant necessarily expended the sum of $3,796.76 in completion of the work left undone by the plaintiff.

XXII. In that the Referee and the Court found and concluded that the defendant has a counterclaim or set off in the sum of $3,796.76, and said amount should be allowed it and deducted from the

sum due and owing to the plaintiff over and above the amount paid it on account of its contract with the defendant (page 55).

XXIV. In that the Referee and the Court found and concluded that the complaint herein should be dismissed.

XXVII. In that the Referee and the Court refused to find and conclude that in the making and performance of the contract in suit plaintiff was engaged in commerce between the States of Pennsylvania and New York.

XXVIII. In that the Referee and the Court refused to find and conclude that in making and performing the contract the plaintiff was within the protection of Article 1, Section 8, subdivision 3, of the Constitution of the United States.

XXIX. In that the Referee and the Court refused to find and conclude that the transactions constituting the cause of action herein were commerce between the States within the meaning of the Constitution of the United States, and as such protected thereby from State regulation.

XXX. In that the Referee and the Court refused to find and conclude that the failure of plaintiff to secure the certificate provided for by Section 15 of the General Corporation Law of New York does not prevent it from maintaining suit in this Court.

XXXI. In that the Referee and the Court refused to find and conclude that Section 15 of the General Corporation Law of the State of New York is contrary to the Constitution of the United States.

XXXII. In that the Referee and the Court refused to find and conclude that the action of the defendant in putting another contractor in plaintiff's place without plaintiff's consent was a violation of plaintiff's rights.

XXXIII. In that the Referee and the Court refused to find and conclude that defendant has failed to establish any lawful or just ground for offset against plaintiff's claim (page 56).

XXXVIII. In that the Referee and the Court refused to find and conclude that plaintiff is entitled to judgment against defendant.

XXXIX. In that the Referee and the Court refused to find and conclude that plaintiff is entitled to judgment against the defendant for the sum of Three thousand seven hundred dollars, with interest from August 18, 1907, and the costs of this action.

XL. In that the Referee and the Court denied plaintiff's motion for judgment in favor of plaintiff against the defendant.

XLI. In that the Court gave judgment against the plaintiff (page 57).

ARGUMENT

POINT I

The judgment in this case is reviewable.

Roberts vs. Benjamin, 124 U. S., 64, 67, 71-72.

The case is on all fours with the case at bar. It was an action at law brought in the Circuit Court for the Northern District of New York. Upon written stipulation by the parties an order was entered by the Court that the action be referred "to determine the issues therein;" the Referee reported special findings of fact and conclusions of law, whereupon the Court, overruling a motion for a new trial, made an order directing "that judgment be entered herein, pursuant to the report of the Referee." This Court held, Mr. Justice Blatchford giving the opinion: "The only questions open to review here are whether there was any error of law in the judgment rendered by the Circuit Court upon the facts found by the Referee. The judgment having been entered 'pursuant to the report of the Referee,' the facts found by him are conclusive in this Court," and proceeded to review the Referee's conclusions of law, holding that "on the finding of fact the rule of damages aplied to this case was in accordance with the authorities," and that, upon other findings of fact and omissions to find, the Referee's conclusion of law that the defendants had not established their counterclaim was correct.

Chicago, M. & St. P. R. Co. vs. Clark, 178 U. S., 353, 364.

Certiorari to the Circuit Court of Appeals for the Second Circuit, to review a decision affirming a judgment on a report of a Referee. The judgment was reversed and judgment was ordered in favor of the plaintiff with costs. An examination of the record shows that the reference was to "hear and determine." Mr. Chief Justice Fuller, delivering the opinion of this Court said:

> "The record shows that the cause came on before the district judge, holding the Circuit Court, for trial, "without a jury, and a trial by jury having been expressly waived by the written consent of the parties duly filed;" that a referee was appointed by written consent in accordance with the modes of procedure in such cases in the courts of record of New York, and with the rules of the Circuit Court; and that his findings, rulings, and decisions were made those of the Court. Under those circumstances the question whether the judgment rendered was warranted by the facts found was open for consideration in the Circuit Court of Appeals, and is so here, and that is sufficient for the disposition of the case."

That case also is, in principle, identical with the case at bar, in which a Referee was appointed by written consent, in accordance with the procedure in the state courts and with the rule of the Circuit Court. It is true that in this case, as in the Roberts case above cited, there was no *express* statement that the findings of the Referee were made those of the Court, but in this case, equally with the Roberts case, that is the substantial effect of the proceedings had. To hold otherwise would be to make of the Federal Statute adopting the state practice, and of the rules of the Circuit Court, a trap for litigants. An express adoption of the Referee's findings by the Court below would be immaterial to the proceedings in the case, and to make such adoption a prerequisite to a review in this Court would make the right to review dependent upon the caprice of the judge and the mere form in which he has expressed his judgment, rather

than upon its substance and legal effect. Such appears to be the view of the Circuit Court of Appeals for the Second Circuit.

> Bagley vs. Gen'l Fire Ext. Co., 150 Fed., 284.

This was the review of a judgment on the report of a Referee "to hear and determine." Examination of the record shows that judgment was entered by the Clerk, without any order by the Court.

No mode of trial in a *State* court prevents this Court from reviewing constitutional questions by writ of error to such court, and we find, in principle or in statute, no reason why the result should be otherwise on writ of error to a Federal Court.

POINT II

The assignments of errors bring up the question of the constitutionality of the Statute of the State of New York excluding foreign corporations, as interpreted by the Referee and the Court, and this Court has jurisdiction.

Act of 1891, Section 5, 26 Stat. L., page 827.

The errors of the Court in declining to consider plaintiff's objections and exceptions, or any of them, in denying the motion to reject the report, and in directing judgment, are specified in assignments of errors I, II and III, page 54. The errors

of the Referee and of the Court in their conclusions of law that the State statute prevented the plaintiff from maintaining this action, are specified in assignments of errors, XVII, page 55, XXIV and XXX, page 56, and XXXVIII, page 57. Their errors in refusing to find that the transactions in suit were interstate commerce and therefore protected by the Federal Constitution, and that the statute referred to is unconstitutional, are specified in assignments of errors XXVII, XXVIII, XXIX and XXXI, page 56.

POINT III

Plaintiff's claim that the Statute of the State of New York was in contravention of the Constitution of the United States sufficiently appears by the record.

The character of plaintiff's business in general and of the transactions sued upon as interstate commerce appear by its amended complaint (pages 4 to 6).

The statute referred to is set up as an affirmative defense in the defendant's answer (page 9).

The New York practice does not require a reply to such a defense, but only to a counterclaim (Code of Civil Proc., §514, *supra*), and provides (Id. §522 *supra*) that the same shall be "deemed controverted, by traverse or avoidance, as the case requires."

Under this provision all possible objections to the statute must be considered as made, and it is apparent that the judgment could not have been

rendered without applying the statute and upholding its constitutionality.

Throughout the record it appears that the plaintiff did claim that the statute was in contravention of the Federal Constitution, and that the main controversy in the case was over that claim. It appears in the Referee's opinion, findings and refusals to find, in the exceptions filed to his report, in the recitals of the order directing judgment, and in the judgment itself.

This was sufficient.

> Loeb vs. Columbia, 179 U. S., 472, 476 to 485.

A case in which as here, "the plaintiff could not have raised in his petition any question of a Federal right," by anticipating the defence; but such question *was* raised by general demurrer, under which counsel claimed on the argument that a statute was unconstitutional. This Court upheld its jurisdiction, citing *Holder* vs. *Aultman*, 169 *U. S.*, 81, 88, and other cases.

Certainly such a claim was made more formally and clearly in the case at bar.

POINT IV

A bill of exceptions is not required or appropriate for raising the points here sought to be reviewed.

Counsel for defendant in error, in quoting from R. S. Section 700, omits the following: "and when the finding is special the review may extend to the

determination of the sufficiency of the facts found to support the judgment."

Aetna Ins. Co. vs. Boon, 95 U. S., 117, Held:

> "No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. They belong to the record as fully as do the verdicts of a jury. If the finding be special, it takes the place of a special verdict; and, when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the finding up for review. But there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record.."

Walnut vs. Wade, 103 U. S., 683, 688:

> "It is thus seen that the only use which can be made of the bill of exceptions, when there is a special finding of facts, is to present the rulings of the Court *in the progress of the trial*, upon questions of law."

POINT V

The business of the plaintiff, and the transaction in suit, are interstate commerce, and, as such, under the protection of the Federal Constitution.

The transaction in suit consisted essentially of the sale of articles manufactured in Pennsylvania, to be thence transported to New York, and there delivered to the defendant.

Such transactions are clearly interstate commerce within the definitions fixed by the Supreme Court, and as such are protected.

Brown vs. Maryland, 12 Wheat., 419, was a case of foreign commerce, but the opinion included in its consideration commerce among the several states, and the Court held:

> "Selling is the object of importation * * * it must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, *but to authorize the importer to sell.*"

Cooper Manufacturing Co. vs. Ferguson, 113 U. S., 727-737:

Held (Mr. Justice Woods):

> "It is clear that the (State) statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the State for carrying on commerce between the States, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several States."

And therefore statutes and a state constitution requiring foreign corporations to file a certificate and have a place of business and agent in the State were held not to forbid a single transaction, namely, the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. The majority of the Court did not think it necessary to decide that the statute was unconstitutional, as thus interpreted, but Justices Mat-

thews and Blatchford concurred in the result on the ground that the statute was unconstitutional, because the State cannot prohibit the corporation "from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States."

Norfolk & Western R. Co., vs Penn., 136 U. S. 114, where it was held, that a corporation engaged in interstate commerce cannot be required to pay a license fee for maintaining an office in the State.

If it be found that the plaintiff has also done some local business, that does not affect its rights.

In Crutcher vs. Kentucky, 141 U. S., 47-62, the Court says:

> "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States) does also some local business by carrying goods from one point to another within the State of Kentucky."

The fact that the plaintiff did some work in putting the frames in place and hanging the sash in the frames, does not deprive it of this protection.

Caldwell vs. North Car., 187 U. S., 622.

Plaintiff, on orders from customers, shipped its goods to its agent, who had a room in a hotel where he unpacked the photographs and frames, put the former in the latter, and then delivered them to the customers. It was held that the business was

interstate commerce, and could not be regulated or subjected to a license fee.

Milan Milling Co. vs. Gorten, 93 Tenn., 590,

Held, that a contract to manufacture, deliver and put in position certain machinery was interstate commerce.

Black-Clawson Co. vs. Carlyle Paper Co., 133 Ill. App., 61, 64 to 67.

Contract to furnish machines, to be delivered free on board cars at Hamilton, Ohio, and to "furnish the time of a competent man to superintend and assist in the erecting of the machinery" at the purchaser's mill in Illinois. Held, that a statute similar to that in the case at bar must be so construed and enforced as not to interfere with interstate commerce, and therefore did not apply, the Court citing

Milan Co. vs. Gorten (supra).

Chuse Engine & Mfg. Co. vs. Vromania, etc., Co., 133 S. W. R., 624 (Mo. App., 1911).

Contract for manufacture, delivery, and erection of machinery, the corporation agreeing also to furnish men, if required, to start the machinery. Held, interstate commerce, and the corporation was not required to obtain a certificate in order to maintain suit.

It is not necessary that the contract to be protected should itself specify or require goods from another State. The substantial character of the business transaction is controlling.

Rearick vs. Pennsylvania, 203 U. S., 507, 511, 512 (error to the Superior Court of the State of Pennsylvania).

In this case an Ohio corporation employed an agent to solicit in Sunbury, Pennsylvania, retail orders to it for groceries.

The State Court sustained a conviction of the agent for selling without a license, on the ground that his contracts "would have been satisfied by the delivery of articles corresponding to sample, although bought at the next door," but the Supreme Court held this immaterial, saying "Commerce among the several states is a practical conception," that is, the law is to be applied to the thing actually done, and not to what *might* have been done.

In the case at bar it is clear that the plaintiff was carrying on an interstate commercial business, and the work it did in setting the frames and hanging the sash was not only of relatively small amount, not exceeding 7½ per cent. of the value of the whole contract, but it was purely incidental to the sale and delivery of its product.

The interstate commerce provision of the Federal Constitution would be seriously impaired if, in order to claim its protection for such a business, the place of origin of the goods must be expressly stated in and with each transaction, or if the seller must keep away from the place of delivery and refrain from erecting, placing, or adjusting his machinery or other products.

POINT VI

It follows that the State Statute referred to, as interpreted by the Referee and applied by the judgment in this case, is in contravention of the Federal Constitution.

The provision that the corporation may not maintain any action in any Court in the State is inseparable from the rest of the statute, and falls with it.

Int'l Text Book Co. vs. Pigg., 217 U. S., 91, 107 to 114.

POINT VII

A reversal of the judgment on this constitutional question alone would require judgment to be entered in favor of the plaintiff for seven hundred nine dollars 52/100 ($709.52).

While the referee found certain facts which, in his opinion, constituted a failure of the plaintiff to perform its contract to some extent, he distinctly held that such failure was waived by the defendant, except as a basis for taking possession of the premises and doing part of the work, charging the expense to the plaintiff and calling in the plaintiff to complete it, and that, but for the statute, the plaintiff was entitled to recover at least the difference between the unpaid portion of the contract and the cost of such completion (page 30, "23," and pages 18, last paragraph and 20, last paragraph).

POINT VIII.

The constitutional question is material also in view of the contention that the defendant's counterclaim or offset is not well founded, and that, on the merits, plaintiff is entitled to judgment for Three thousand five hundred six 28/100 Dollars ($3,506.28) being the amount unpaid upon its contract, less only what it would have cost it to do the work which the defendant had done by others.

The contract in suit, properly interpreted, did not require the plaintiff to come to terms with the labor union.

The provision relied upon is in Article VIII of the contract, to the effect that "in the event of any strike or cessation of work caused by character or condition of labor employed or material furnished * * * the contractor shall make good to the owner any loss or damage caused" (page 28 "5"). The provision is vague but would seem to refer, primarily at least, to a strike which should delay the work which plaintiff itself was to do, that is, a strike among its own workmen. It should not be construed so as to make the plaintiff liable for any and every strike, whether justifiable or not, or by workmen not employed by it, and in no way within its control, but only for the consequences of such strikes as were caused by some real fault on the plaintiff's part. It should not be held to require the plaintiff to yield to any objections or to illegal demands of strangers to the contract. In the case at bar, the hostility of the labor union was *par-*

ticularly directed against the interstate character of plaintiff's business.

Irving vs. Joint Distr. Counsel of N. Y., Etc., 180 Fed., 896, 901.

This was a suit against members of the "United Brotherhood of Carpenters," who were threatening a strike of the same character and for the same purpose as in the case at bar. Held, illegal, and motion granted for an injunction to restrain "the calling out of the employees in other trades, who have no grievance against their employers, and the notification of owners, builders, architects, and third persons, that they are likely to have their operations held up if they use the complainants' trim." Citing Adair vs. U. S., 208 U. S., 161, 174, and Purvis vs. Local No. 506, 214 Pa., 348, 353.

Further argument on this point is reserved until the case is heard on the merits.

POINT IX.

The motion to dismiss or affirm should be denied.

This Court has jurisdiction, and the case of plaintiff in error is substantial and meritorious.

Dated, October 10, 1911.

Respectfully submitted,

WILLIAM FORD UPSON,
Counsel for Plaintiff in Error.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States.

DAVID LUPTON'S SONS COMPANY,
Plaintiff-in-Error,

AGAINST

AUTOMOBILE CLUB OF AMERICA,
Defendant-in-Error.

October Term
1911.
Number 137.

DEFENDANT'S BRIEF.

The reasons stated in defendant's brief on motion to dismiss or affirm should dispose of this appeal; but in view of the Court's postponement of a decision of that motion until after the hearing on the appeal, it seems advisable that the defendant should submit a brief argument on the merits. It is difficult to discuss this case upon the merits because of the incomplete condition of the Record; but as the plaintiff-in-error has made a lengthy statement of the case and it is incomplete and erroneous, it seems incumbent upon defendant to make good the omissions.

The plaintiff sued the defendant for the balance claimed to be due on a contract under which it agreed to manufacture and put in place certain frame and sash in the Club House being constructed

by the defendant in The City of New York. This contract provided, among other things,

> "That should Lupton's Sons (the plaintiff) delay the work so as to cause any damage for which The Automobile Club (the defendant) should be liable, or in the event of any strike or cessation of work caused by the character or condition of labor employed or materials furnished continuing for eight days, that the Automobile Club (the defendant) should have full authority to arbitrate or adjust the matter, and that Lupton Sons (plaintiff) should make good to the Automobile Club (the defendant) any loss or damage caused."

And said contract further provided:

> "That the Automobile Club (the defendant) reserve the right to acquire such labor on the work as would not conflict with Lupton's Sons (the plaintiff's) trade, or any other trade, or interfere with the proper and uninterrupted execution of the building operations (Transcript of the Record, fol. 14).

The plaintiff was unable to comply with these requirements and a general strike occurred on the defendant's Club House by reason of the character of the labor employed by the plaintiff (Transcript of the Record, fol. 17).

Due notice thereof was given to the plaintiff and it was required to furnish workmen of a character which would permit of the building operations being resumed (ditto).

The plaintiff was unable to comply with this requirement of its contract and after notice that it should proceed with the work, and default on its part in so doing, the defendant proceeded with and completed the plaintiff's contract (ditto).

The defendant paid the plaintiff eighty-five (85%) per cent. of the work done by it at that

time (Transcript of Record, fol. 67), but withheld the balance of the contract price on account of the plaintiff's failure to complete. Plaintiff thereafter sued the defendant for the balance due under its contract, less the cost of completing the work and the defendant defended, not only as intimated in the brief of plaintiff-in-error on the ground that the plaintiff was a foreign corporation, which had not complied with the Statutes authorizing it to do business in the State of New York, and was not in a position therefore to maintain an action on its contract, but also on the ground that the plaintiff had neither performed, nor substantially performed its contract, and that it was not entitled to recover any part of the balance of the contract price (Transcript of Record, pp. 10 and 11).

The transaction resulted not only in a loss to the plaintiff, but in a loss to the defendant which it estimated at Twenty thousand ($20,000) Dollars, by reason of the delay in the completion of its building, caused by the failure of the plaintiff to complete its work in accordance with the terms of the contract (Transcript of Record, fol. 18, Paragraph XIX).

It is this defense that the plaintiff-in-error carefully omits to notice on this appeal, endeavoring to give the Court the impression that the only question involved in this case, is whether the plaintiff could maintain an action on its contract in spite of the fact that the plaintiff had failed to comply with the New York Statute in filing a statement, paying a tax, and otherwise qualifying itself to do business within the State. The Referee found that the plaintiff had failed to comply with the New York Statutes and could not maintain an action upon its contract. But he also found that the plaintiff had failed to carry out its contract.

See the following findings (Transcript of Record, p. 29):

10. That the plaintiff failed and neglected to hang all the sash to be hung by it under its contract with the defendant.

11. That under its said contract with the defendant the plaintiff was to hang 731 sash.

12. That the plaintiff hung only about 72 sash.

15. That the plaintiff failed, refused and neglected to furnish labor that would not conflict with its own or other trade in the execution of the building operations of the defendant.

18. That plaintiff continued and has at all times continued to fail, refuse and neglect to provide suitable labor that would not conflict with the other trades in the execution of the building operations of the defendant and to proceed with its work.

The Referee also found that the plaintiff did not even put in place all of the frames (Transcript of Record, fol. 68).

In other words, the plaintiff had substantially failed to complete its contract.

As a conclusion of law, the Referee found that the complaint should be dismissed, with costs (Transcript of Record, fol. 56).

The defendant-in-error submits the following points which it claims will dispose of this appeal:

Point I.

That under the Transcript of Record as presented on this appeal, the Court has no option but to dismiss or affirm.

Point II.

That the Referee found facts sufficient against the plaintiff-in-error to justify his conclusion that the action could not be maintained.

Point III.

That this Court cannot review any of the exceptions to the findings of fact by the Referee, or to his refusal to find facts as requested.

POINT I.

Under the Transcript of Record as presented on this appeal, the Court has no option but to dismiss or affirm. .

The argument upon this point will be found in defendant's brief on motion to dismiss or affirm, and it is unnecessary to repeat it here.

POINT II.

The Referee found facts sufficient against the plaintiff-in-error to justify his conclusion that the action could not be maintained.

The findings which appear at pages 26 to 30 of the Transcript of Record, as has been already indicated, show that the defendant had failed to comply with the terms of its contract in that it had neglected to furnish labor which would not conflict with the plaintiff's trade, or any other trade, or interfere with the proper and uninterrupted exe-

cution of the building operations of the defendant. That it had failed to set a portion of the frames or to hang any of the sash covered by its contract. This was a substantial failure to perform. It cost the defendant Three thousand seven hundred and ninety-six and 76/100 ($3,796.76) Dollars to complete the work left undone by the plaintiff (Transcript of Record and Finding XXI, p. 30).

The plaintiff itself admits that the cost to it for completing the work would have been at least One thousand ($1,000) Dollars (Transcript of Record, Finding XXXIX, p. 39).

The plaintiff having failed to perform, and there being no pretence that it had any excuse for non-performance, or that performance had been waived, could not recover and the complaint was properly dismissed.

Smith *v.* Brady, 17 N. Y., 173.
Spence *vs.* Ham, 163 N. Y., 220.
Fuchs *v.* Saladino, 133 A. D., 710.
Schultze *v.* Goldstein, 180 N. Y. 249.

Impossibility of performance without fault of contractor does not excuse him from performing contract.

Jacksonville Ry. *vs.* Hooper, 160 U. S., 514, 527.

POINT III.

This Court cannot review any of the exceptions to the findings of fact by the Referee, or to his refusal to find facts as requested.

The Referee having found the facts against the plaintiff-in-error, this Court has no option on the Record but to affirm the judgment entered on his findings. The Record contains no bill of excep-

tions and fails to show what questions, if any, were raised upon the trial before the Referee, and fails to show that any question which would give this court jurisdiction was in issue in the court below.

As was said in the case of Roberts *v.* Benjamin, cited by plaintiff-in-error:

> "This case not having been tried in the Circuit Court on the filing of a waiver in writing on a trial by a jury, this Court cannot, on this writ of error, review any of the exceptions taken to the admission or exclusion of evidence, or to any of the exceptions to the findings of fact by the Referee, or to his refusing to find facts as requested."
>
> Roberts *v.* Benjamin, 124 U. S., 74.

This Court therefore cannot consider any of the errors assigned by the plaintiff-in-error at pages 19, 20 and 21 of its brief, except, if it entertains the appeal at all, those based on the refusal of the Referee to find that the failure of the plaintiff-in-error to comply with Sections 15, 16 and 181 of the General Corporations Law of the State of New York by the filing of a statement, procuring a Certificate of Authority and paying the tax therein provided for, did not prevent it from maintaining a suit in this Court. As to those assignments of error, defendant claims:

FIRST.—That the Court cannot consider them because the Transcript of Record contains no bill of exceptions and thus fails to show what questions were raised on the trial of the action before the Referee; and so far as the Record shows the only exceptions were filed by the plaintiff-in-error after the Referee had rendered his decision, and therefore cannot be presumed to have been considered on the trial.

See argument, Point III, Defendant's Brief on motion to dismiss or affirm.

SECOND.—That the Referee having found that the plaintiff, so far as the transaction in suit was concerned, was doing business in the State of New York, and was not engaged in interstate commerce, that finding is conclusive upon this Court on the Record presented to it, and cannot be called in question. Incidentally, we might say that the Referee's decision was amply justified under the following authorities:

> Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S., 611.

THIRD.—That the Referee was right in holding that an action could not be maintained by the plaintiff against the defendant under the circumstances of this case.

The Court of Appeals, the highest Court in the State, having held in Wood *v.* Ball, 190 N. Y., 217:

> "That the procuring of a license must precede the transaction of business or the contracts of the corporation are not lawful;" it follows that an action thereon cannot be maintained, either in the State Courts, or in the Federal Courts. For if the contracts are not lawful they are void and no court can enforce them.
>
> Colonial Trust Co. *v.* Montello Brick Co., 172 Fed. Rep., 310.

But this Court will hardly consider that question on this appeal, for the reason that it is not directly involved. As heretofore pointed out, the Referee has found that the plaintiff failed to carry out its contract and therefore could not maintain this action, and his findings on that subject are sufficient to justify the conclusions that the action could not be maintained.

Whether, therefore, the contract was void or not because of failure to comply with the New York

Statutes, and whether or not an action could be maintained thereon in the Federal Courts is immaterial.

POINT IV.

No Federal question is involved which would give this Court jurisdiction.

The question of the construction of the New York Statute is not a Federal question. It does not raise constitutionality of statute, but construction merely.

Swing *v.* Weston Lumber Co., 205 U. S., 275, 278.

The judgment should be affirmed, or the appeal dismissed, with costs.

Dated, December 15th, 1911.

Respectfully submitted,

WILLIAM W. NILES,
Counsel for the Defendant-in-Error.

DAVID LUPTON'S SONS COMPANY *v.* AUTOMOBILE CLUB OF AMERICA.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 137. Argued December 20, 1911.—Decided June 7, 1912.

Where the trial in the Circuit Court is before a referee by stipulation, the only question here is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee. These findings are conclusive in this court. Nor can this court pass upon exceptions to the refusal of the referee to find facts as requested.

In determining whether, under a state statute, failure to comply with its terms renders a contract void or merely acts as a bar to maintaining an action thereon, the Federal court must follow the interpretation given the statute by the highest court of the State.

As construed by the Court of Appeals of that State, § 15 of the General Corporation Law of New York does not make contracts of a foreign corporation which has not complied with its provisions absolutely void, but merely disables the corporation from suing thereon in the courts of the State.

Where the contract of a corporation of one State not complying with the statutes of another State where the contract is made, is not void, the corporation can maintain its action, if jurisdiction otherwise exists, in the Federal courts.

A State cannot prescribe the qualifications of suitors in the Federal courts; nor can it deprive of their privileges those who are entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of valid contracts.

Judgment ordered for plaintiff for amount fixed by referee's findings of fact.

THE facts, which involve the construction of § 15 of the General Corporation Law of New York, and the right of foreign corporations which had not complied therewith, to sue in the Federal courts, are stated in the opinion.

Mr. William Ford Upson, with whom *Mr. William Forse Scott* was on the brief, for plaintiff in error:

The judgment entered on the report of the referee is reviewable. *Roberts* v. *Benjamin*, 124 U. S. 64, 67; *Chicago, M. & St. P. R. Co.* v. *Clark*, 178 U. S. 353, 364; *Bagley* v. *Gen. Fire Ext. Co.*, 150 Fed. Rep. 284.

Plaintiff's claim that the statute of the State of New York was in contravention of the Constitution of the United States sufficiently appears by the record. *Loeb* v. *Columbia*, 179 U. S. 472, 476; *Holder* v. *Aultman*, 169 U. S. 81, 88.

A bill of exceptions is not required or appropriate for raising the points here sought to be reviewed. Rev. Stat., § 700; *Ætna Ins. Co.* v. *Boon*, 95 U. S. 117, 124; *Walnut* v. *Wade*, 103 U. S. 683, 688.

The transaction in suit, consisting essentially of the sale of articles manufactured in Pennsylvania, to be thence transported to New York and there delivered to defendant, was interstate commerce and as such under the protection of the Federal Constitution. *Brown* v. *Maryland*, 12 Wheat. 419, 447; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 734; *Norf. & West. R. Co.* v. *Pennsylvania*, 136 U. S. 114.

If plaintiff has also done some local business, that does not affect its rights. *Crutcher* v. *Kentucky*, 141 U. S. 47, 59.

The fact that plaintiff did some work in putting the frames in place and hanging the sash in the frames does not deprive it of protection. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Milan Milling Co.* v. *Gorten*, 93 Tennessee, 590; *Black-Clawson Co.* v. *Carlyle Paper Co.*, 133 Ill. App. 61; *Chuse Engine Co.* v. *Vromania Co.*, 133 S. W. Rep. 624; *Wolf Co.* v. *Kutch*, 132 N. W. Rep. 981.

It is not necessary that the contract to be protected should itself specify or require goods from another State; the substantial character of the transaction is controlling.

Rearick v. *Pennsylvania*, 203 U. S. 507, 511; *Swift & Co.* v. *United States*, 196 U. S. 375, 398.

The New York statute is in contravention of the Federal Constitution, and the provision that the corporation may not maintain any action in any court in the State is inseparable from the rest of the statute and falls with it. *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 108.

The interference of defendant excused performance of the contract to the extent of the work which defendant caused to be done by others. *United States* v. *Peck*, 102 U. S. 46; *Kingsley* v. *Brooklyn*, 78 N. Y. 200, 216.

Defendant waived any default of strict performance on the part of plaintiff.

In substance and effect the referee's report was in favor of the plaintiff, for his legal conclusions are overborne by his specific findings from which opposite conclusions should have been drawn.

Mr. William W. Niles for defendant in error:

The judgment entered herein on the report of the referee is not reviewable. *York &c. R. R.* v. *Myers*, 18 How. 252; *Campbell* v. *Boyreau*, 21 How. 223; *Kearney* v. *Case*, 12 Wall. 275.

The alleged errors assigned herein do not raise any issue which would give this court jurisdiction to review the judgment herein entered.

The Supreme Court will not review alleged errors in the refusal of the court to find facts requested. *Shipman* v. *Straitville Mining Co.*, 158 U. S. 361; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 250.

The transcript of record contains no bill of exceptions, and thus fails to show what questions were raised on the trial of the action before the referee, and fails to show that any question which would give this court jurisdiction was in issue in the court below. Rev. Stat., § 700; *Insurance Co.* v. *Folsom*, 18 Wall. 237; see pp. 249, 250.

Even in the state practice of New York, the questions presented on appeal must have been raised in the court below in order to be reviewable. None of the so-called exceptions filed by the plaintiff in error raise any question which could give this court jurisdiction to review, particularly so as this court will not review errors alleged to have been made by the refusal of this court to make requested findings. *Shipman* v. *Straitville Mining Co.*, 158 U. S. 361; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 250.

The alleged errors assigned cannot be reviewed without a bill of exceptions, and no such bill was ever prepared, allowed, settled or filed.

Practically all alleged errors assigned relate to the findings of fact, which the court will not review.

All the alleged errors on rulings of law that the court might possibly review are immaterial in view of the finding by the referee of all material facts affecting the merits in favor of the defendant, and in view of said referee's finding that the plaintiff had substantially failed to carry out its contract and had broken its contract. *Holder* v. *Aultman*, 169 U. S. 81; *Burton* v. *United States*, 196 U. S. 283, 295.

Plaintiff having failed to perform, and there being no pretense that it had any excuse for non-performance, or that performance had been waived, could not recover and the complaint was properly dismissed. *Smith* v. *Brady*, 17 N. Y. 173; *Spence* v. *Ham*, 163 N. Y. 220; *Fuchs* v. *Saladino*, 133 A. D. 710; *Schultze* v. *Goldstein*, 180 N. Y. 249.

Impossibility of performance without fault of contractor does not excuse him from performing contract. *Jacksonville Ry.* v. *Hooper*, 160 U. S. 514, 527.

The referee having found that the plaintiff, so far as the transaction in suit was concerned, was doing business in the State of New York, and was not engaged in interstate commerce, that finding is conclusive upon this court

on the record presented to it, and cannot be called in question. The referee's decision was amply justified under the decision of this court in *Diamond Glue Co.* v. *U. S. Glue Co.*, 187 U. S. 611.

The referee was right in holding that an action could not be maintained by the plaintiff against the defendant under the circumstances of this case. *Wood* v. *Ball*, 190 N. Y. 217; *Colonial Trust Co.* v. *Montello Brick Co.*, 172 Fed. Rep. 310.

No Federal question is involved which would give this court jurisdiction.

The question of the construction of the New York statute is not a Federal question. It does not raise constitutionality of statute, but construction merely. *Swing* v. *Weston Lumber Co.*, 205 U. S. 275, 278.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error, David Lupton's Sons Company, a Pennsylvania corporation, was engaged in the business of manufacturing and installing metal window frames and sash. Its factory was in Pennsylvania. In 1905 it entered into a contract in New York with the defendant, The Automobile Club of America, by which it agreed to manufacture and to place in position frames and sash for the defendant's building, to be erected in the city of New York, for the sum of $10,344. While the Lupton Company was putting in the frames a strike occurred, and all the other persons employed by the defendant in the construction of the building stopped work on account, as it is found, "of the character and condition of labor" employed by the Lupton Company, and the material it furnished, of which complaint had been made by a New York labor union. After various negotiations, the defendant—under an adjustment by the architect and in order to get its building constructed—employed another

concern to complete the work embraced in the contract with the Lupton Company. The latter received, for what it did, $5,837.72; the defendant paid for the completion $3,796.76, and if this were credited against the contract price there would remain a balance of $709.52.

The Lupton Company, insisting that it was wrongfully prevented from performance, brought this suit in the Circuit Court of the United States to recover the sum of $5,000 as the damages sustained by the alleged breach. The defendant pleaded several defenses, as well as a counterclaim for damages for breach by the plaintiff. Among the defenses was one that the Lupton Company could not maintain this action because it was a foreign corporation doing business in the State of New York without a certificate of authority in violation of § 15 of the General Corporation Law of that State. Laws of 1890, p. 1063, c. 563, § 15; Laws of 1892, p. 1805, c. 687, § 15, as amended.

Upon written stipulation the action was referred to a referee to hear and determine the issues. The referee reported his findings of fact and conclusions of law, holding that the contract was void under the statute and that the complaint should be dismissed. Upon the plaintiff's application, the report was recommitted in order that further findings might be proposed. The referee then passed on numerous requests submitted by the plaintiff, and on the filing of his supplemental report, which left unchanged the original conclusions of law, judgment was entered for the defendant. The Lupton Company brings the case here on writ of error to the Circuit Court upon the ground that the New York statute, as applied to the transaction in question, was in contravention of the Constitution of the United States as an unwarrantable interference with interstate commerce.

As the trial was had before the referee pursuant to the stipulation, the only question presented here is whether

there is any error of law in the judgment rendered by the court upon the facts found by the referee. The findings of fact are conclusive in this court. We cannot review any of the exceptions to these findings or to the refusal of the referee to find facts as requested. *Roberts* v. *Benjamin*, 124 U. S. 64, 71, 74; *Shipman* v. *Straitsville Mining Co.*, 158 U. S. 356, 361; *Chicago, M. & St. P. Rwy. Co.* v. *Clark*, 178 U. S. 353, 364; *Hecker* v. *Fowler*, 2 Wall. 123; *Bond* v. *Dustin*, 112 U. S. 604; *Paine* v. *Central Vermont R. R. Co.*, 118 U. S. 152, 158.

Under § 15 of the General Corporation Law of the State of New York a foreign stock corporation, other than a moneyed corporation, is prohibited from doing business in the State without having first procured from the Secretary of State a certificate that it has complied with certain prescribed conditions. The corporation is required (§ 16) to file with the Secretary of State a sworn copy of its charter and a statement setting forth the business which it proposes to carry on in the State; to designate its principal place of business within the State and to appoint a person upon whom legal process may be served. *Wood & Selick* v. *Ball*, 190 N. Y. 217, 224. Section 15 provides: "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate." In his original report, the referee found that the Lupton Company was doing business in the State of New York, within the meaning of the statute, without a certificate of authority; and after the report was recommitted he made additional findings with respect to the nature of its business, upon which the plaintiff in error bases its contention that the statute has been held to apply to transactions in interstate commerce which were not subject to the State's interdiction. It is not necessary, however, to review these findings, for the statute has received a construction by the

highest court of the State of New York which precludes it, in any aspect of the case, from being regarded as a bar to the maintenance of this action.

The referee's ruling that the contract was void was based upon the statement in the opinion in *Wood & Selick* v. *Ball*, *supra*, that "the procuring of a license must precede the transaction of business or the contracts of the corporation are not lawful." But in *Mahar* v. *Harrington Park Villa Sites*, 204 N. Y. 231, the Court of Appeals of New York has declared that a contract made by a foreign corporation doing business within the State without certificate of authority is not absolutely void; that the only penalty prescribed by the General Corporation Law for a disregard of the provisions of § 15 is a disability to sue upon such a contract in the courts of New York; and that the contract remains valid and effective in all other respects.

In the *Mahar Case*, the action was brought to recover a sum deposited under a contract made in New York with the defendant, a foreign corporation, which it was alleged was transacting business in the State without authority at the time the contract was made. It was asserted, in support of the action, that the contract was void and hence that there was a failure of consideration. The Court of Appeals held that the complaint did not state a cause of action. In the opinion delivered by Willard Bartlett, J., in which the majority of the court concurred, it is said (p. 234):

"It is assumed in the prevailing opinion" (that is, the opinion below, 146 App. Div. 756), "that this court held in the case of *Wood & Selick* v. *Ball* (190 N. Y. 217) that non-compliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this state absolutely void. Such is not my understanding of the purport of that decision. The only proposition decided in that case was 'that compliance with

section 15 of the General Corporation Law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this state.' . . . The only penalty which the General Corporation Law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York. 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate.' (Cons. Laws, ch. 23, section 15.) This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but in my opinion it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York without the certificate of authority required by section 15 of the General Corporation Law is limited to that thus prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this state without having obtained the certificate; but it has not done so. This was the view taken in *Alsing Co.* v. *New England Quartz & Spar Co.* (66 App. Div. 473; affd., 174 N. Y. 536) where it was held that section 15 did not prevent a foreign stock corporation doing business here without having procured the necessary certificate from recovering upon a counterclaim growing out of the transaction upon which the plaintiff sued. 'The defendant, having been brought into court and thus made to defend,' said Mr. Justice O'Brien in that case, 'should be allowed, unless there is a distinct provision to the contrary, not only to defend but also to litigate any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such prohibitive provi-

sion in this statute, and, therefore, the obtaining of the certificate would not be a prerequisite to a recovery upon the counterclaim in question.' (p. 476.) The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state imposing conditions upon it as a prerequisite to the lawful transaction of business therein. In *Fritts* v. *Palmer* (132 U. S. 282) a tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from purchasing or holding land in that state until it should acquire the right to do business therein by fulfilling certain prescribed conditions. Here the Missouri corporation had unquestionably violated the laws of Colorado when it purchased the property without having previously designated its place of business and an agent, as required by the Colorado statute. The only penalty which that statute provided, however, for non-compliance with these provisions was that the officers, agents and stockholders should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held the fair implication to be that, in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute prescribing the terms upon which foreign corporations might do business in that state; and hence the judiciary ought not to inflict the additional and harsh penalty of forfeiting the estate which had been conveyed to the Missouri corporation. In other words, the court refused to treat the conveyance as void, notwithstanding that it was made to a corporation which was forbidden to receive it.

"If I am right in assuming that the only infirmity in the contract mentioned in the complaint is the disability of one of the parties to it, namely, the foreign corporation,

to sue upon it in the courts of this state, it remains a valid and effective instrument in all other respects."

In this view, despite its transaction of business without authority, the foreign corporation could sue upon its contracts in any court of competent jurisdiction other than a court of the State of New York. Accordingly, it was held by the Court of Errors and Appeals of New Jersey that a suit might be brought by the corporation in that State upon a contract made in New York, where it was doing business without the prescribed certificate. *Alleghany Co.* v. *Allen*, 69 N. J. Law, 270. The court conceded the general rule both in New Jersey and New York to be that a contract void by the law of the State where made would not be enforced in the State of the forum. But it was held that the New York statute did not in terms declare the contract void; it provided that no such action should be maintained in that State.

In dismissing the writ of error to review that judgment (*Allen* v. *Alleghany Co.*, 196 U. S. 458, 465) this court commented upon the decision of the New York court in the case of the *Neuchatel Asphalte Co.* v. *The Mayor*, 155 N. Y. 373, which arose under the statute in an earlier form, the section (15) of the General Corporation Law then providing that the foreign corporation should not maintain "any action in this State upon any contract made by it in this State until it shall have procured such certificate." This court said: "The Court of Appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for non-compliance was provided, except the suspension of civil remedies in that State, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts* v. *Palmer*, 132 U. S. 282."

It must follow, upon the similar construction of § 15 as it read at the time of the transaction in question, that

the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. *Union Bank* v. *Jolly's Adm'rs*, 18 How. 503, 507; *Hyde* v. *Stone*, 20 How. 170, 175; *Cowles* v. *Mercer County*, 7 Wall. 118, 122; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Lawrence* v. *Nelson*, 143 U. S. 215; *In re Tyler*, 149 U. S. 164, 189; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 111. The State in the statute before us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case*, was a disability to sue "in the courts of New York." Before this decision of the state court, the Circuit Court of Appeals for the Second Circuit reached the same conclusion as to the meaning of the statute and upheld the right of the foreign corporation to sue in the Federal court. *Johnson* v. *New York Breweries Co.*, 178 Fed. Rep. 513, 101 C. C. A. 639. The court below erred in dismissing the complaint.

With respect to the facts going to the merits of the claim of the Lupton Company, the referee made numerous findings which it is not necessary to set forth or to review at length. The contract provided that "in the event of any strike or cessation of work, caused by character or condition of labor employed or material furnished," the owner should have full authority "to arbitrate or adjust the matter" and the contractor should make good the loss, to be fixed by the architect or by arbitration. This clause was evidently inserted to meet the sort of difficulty which actually arose. The referee found, as has been stated, that it was "on account of the character and condition of labor employed by the plaintiff and the material furnished

by it" that the strike took place and all the other persons employed on the building stopped work. It was also found that to complete the contract the defendant necessarily expended the sum of $3,796.76. This was done under an adjustment by the architect, and upon the findings the defendant was properly allowed a credit for the amount thus paid. There remained due to the plaintiff the sum of $709.52, for which it was entitled to judgment with interest.

Judgment reversed and the cause remanded to the District Court with instructions to enter judgment in favor of the plaintiff for $709.52, with interest from the date of the commencement of the action.